# The Dutch Criminal Justice System

176

**Onderzoek en beleid**

Organization and operation

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# Contents

# 1

# Penal policies

The Dutch criminal justice system has long been noted for its mildness. As support for this view reference was usually made to the small prison rate in the Netherlands compared with other European countries. In the 70's the prison rate was around 20 per 100,000.
At present the prison rate tends to around 90 per 100,000. For many this increase is shocking. That feeling is understandable when one only looks at the figures. Behind the figures, however, there is a reality that differs considerably from the picture given by the figures.

The low prison rate in the 70's and the early 80's was partly of cosmetic nature because it didn't show that in practice there was a considerable difference between actual prison capacity and the need for capacity, due to the so-called 'waiting lists'.
In the Netherlands offenders who are not in pre-trial detention when they have to stand trial and when they are sentenced to imprisonment do not serve their prison-sentence immediately after the court session but are put on a waiting list and are called to serve their sentence as soon as there is capacity.
From the mid 70's the backlog in implementation of prison sentences of those who were put on waiting lists was increasing. Partly that was caused by the new legislation on pre-trial detention, which in fact did reduce the number of pre-trial detainees, and so fewer people were serving their sentence consecutively on the court session where they got their prison sentence. The further aim of the pre-trail detention legislation that the reduction of pre-trial detention cases would lead to a reduction in prison sentences did not come true. Too late the prison department of the Ministry of Justice realized that the actual capacity and the need for capacity did not meet anymore. On the contrary, in those years there was even a prison policy, which led to the closing-down of prisons.
First at the beginning of the 80's a more wide scale extension of the prison capacity started. A new prison construction program was set up which led to an extension of the prison capacity with 900 places at the end of the 80's. Despite this construction program the backlog in implementation of prison sentences increased.
In the early 90's the largest prison construction program up to now started. Between 1994 and 1996 14 new prisons were opened and at the beginning of the year 2000 the prison capacity will be approximately 16,300 cells.
In the last decade the prison rate more than doubled. At present the Netherlands has one of the fastest growing prison populations in the world.

This increase in prison capacity is partly due to more severe sentences. Although the crime rate has increased substantially the number of prison sentences, in relation to the increased crime, has remained rather stable. The average prison sentence, however, has become much longer. In 1970 almost 13,000 prison sentences were imposed with a total of 2,100 detention years. Twenty-five years later the number of prison sentences doubled and the number of detention years increased fivefold. Since the Netherlands still operates as a rule the principle of only one prisoner per cell, the increasing number of detention years led to an increasing number of prison cells and average prison occupation.
The other reason for increase in prison capacity is a new policy influenced by serious critics on the delayed implementation of prison sentences.
In various memoranda and policy plans the importance of an efficient and effective implementation of prison sentences had been stressed. In the 1990 prosecution services' policy plan *Criminal law and criminal policy* the delayed implementation of the prison sentences was regarded to be in conflict with legal guarantees. Proper implementation is the cornerstone for a reliable administration of criminal justice.
In 1995 the Committee on the Reconsideration of the Instruments for Law-enforcement, spoke about the deplorable practice of implementation of prison sentences or other judicial decisions on deprivation of liberty, and the State Audit Committee issued in 1996 a very critical report on this subject as well after having calculated that there were more than 20,000 prison sentences waiting to be implemented and after having confirmed that annually thousands of pre-trial detention orders could not be implemented due to a lack of prison capacity.
The stereotype of the Netherlands as a country with exceedingly mild penal policies is – like most stereotypes – greatly oversimplified. Nonetheless in comparison with many European countries and more so compared with the United States, the Dutch penal policy is less incapacitative.
Penal policies since the 80's have been characterized by strong tendencies to reduce the use of short-term imprisonment and to expand the use of non-custodial sanctions.
During the same period when prison sentences became longer and the number of prison cells rose sharply, the use of short-term imprisonment fell, fines became the preferred sentence, prosecutorial diversion grew rapidly, community sentences came into use and new substitutes to custodial sentences have been developed.
A remarkable feature of present day criminal law enforcement in the Netherlands is that only a small percentage of all crimes which are registered by the police are actually tried by a criminal court. While the number of registered crimes increased more than fivefold between 1970 and 1995, the number of cases tried in court only doubled.
In 1995 1,5 million crimes were brought to the notice of the police. An official report by the police was drawn up in 1,3 million cases. The number of cases solved was

250,000. Other investigation agencies have added another 35,000 cases. Due to the connexity of a number of cases the prosecution service took a prosecution decision in 260,000 cases.
Almost half of the cases (126,000) were settled by the prosecution service of which 34,000 through a dismissal due to technicalities, 30,000 through a dismissal due to the use of the expediency principle and 62,000 cases through transaction.
The other cases were tried by a criminal court and resulted in 130,500 sentences of which 47,000 fines, 47,000 prison sentences and 15,000 community service orders.
These figures show that deprivation of liberty is still considered to be the last resort and that the relative mildness of Dutch criminal justice is built into the system itself as a core element of the Dutch criminal policy.

# 2

# The Dutch Criminal Code

## 2.1 History

The history of the present Dutch Criminal Code starts in 1811 when the Kingdom of the Netherlands was incorporated into the French Empire and the Penal Code for the Kingdom of Holland, in force since 1809, was replaced by the French Napoleonic *Code Pénal.*

After the restoration of independence in 1813, the French code was kept in force provisionally, however, with some important changes. For instance the jury system was abolished and the sanctions system of the 1809 code was re-introduced.

The 1813 Dutch Constitution stipulated that the main body of substantive and procedural criminal law is to be regulated in codes.

During the nineteenth century a number of draft criminal codes were presented, but the lack of parliamentary unanimity on the sanctions system and the prison system prevented adoption of any of these drafts.

However, important revisions of the criminal code took place in particular on sanctions. The range of sentences was reduced to various forms of prison sentences, fines, suspension of certain rights and forfeiture of certain goods. Corporal punishment was abolished in 1856, as was the death penalty in 1870. Fine default detention was introduced in 1864.

In fact the ideas of the classical school of criminal law, prevalent in the French *Code Pénal,* gradually were replaced by modern ideas which lead to a more humane sanction system and a more humane prison system.

Dutch prisons at that time, mainly build in the 17th century, were not fit for those modern ideas. The prison regime was very harsh, mainly focused on re-education. There was no differentiation in prisons according to age, term of prison sentence, first offender or recidivist etc. Imprisonment had a detrimental effect on prisoners. Prisoners were not confined in individual cells but in common quarters.

In 1823 the Dutch Association for the Moral Improvement of Prisoners was established by some citizens. The aim of the Association was the moral advancement of the prisoners. The volunteers of the Association tried to combat the threat of moral decay arising from the lamentable conditions in prison by visits, educational measures, religious instruction and the provision of books.

The Dutch Association played an important role in the final adoption by the Members of Parliament of the cellular prison system (the 'Pennsylvanian system') which opened the way for the first truly national criminal code.

In 1863 the subsequent Minister of Justice, Modderman, published his doctorate thesis: The reform of our criminal legislation. It contained a detailed description of how a national criminal code should be drafted.
In 1870 a penal law reform committee was established that drafted a criminal code which was submitted to Parliament in 1879 by Modderman in his capacity of Minister of Justice. The code was adopted in 1881, but came into force in 1886, because a number of Acts had to be reformed and new prisons based on the cellular prison system had to be build first.

## 2.2 Major Criminal Code reforms

Since 1886 the Criminal Code has been reformed considerably. New criminal provisions have been added like provisions against discrimination, intrusion of the privacy, environmental pollution, illegal computer activities and commercial surrogate mothership. Other offences, such as adultery or homosexual acts between an adult and a juvenile of over 16 years of age have been decriminalized.
Major criminal law reforms took place in juvenile criminal law (1965 and 1995), on sentencing – the extension of suspended sentences (1987), the introduction of early release (1987), the reform of fines (1983), the introduction of community sentences (1989-1995) – on corporate criminal liability (1976) and on serious offences against public morals.
At the occasion of the 100th anniversary of the Criminal Code, the question was raised whether a full re-codification of Criminal Code was advisable. There was no great enthusiasm for this idea. Preference was expressed for constant partial law reforms and for gradually modernizing the present Criminal Code.

## 2.3 Characteristics of the Criminal Code

In comparison to the French Penal Code the Dutch Criminal Code was characterized by its simplicity, practicality, faith in the judiciary, adherence to egalitarian principles, consideration of social evil, absence of specific religious influence and recognition of an autonomous 'legal consciousness'.
Its simplicity, for instance, is evident from the legal definition of criminal offences, from the division of criminal offences in either crimes or infractions and from its sanctions system with only three principal sentences, namely imprisonment, detention and fine.
Its faith in the judiciary was evident from the absence of specific minimum sentences for serious offences and the wide discretionary power in sentencing.
The Dutch Criminal Code does not contain distinctions and definitions of a dogmatic nature. Neither definitions on various forms of culpability or causation nor definitions on defenses are to be found in the Code.

The criminal code is a very practicable one leaving the modern development of criminal law doctrine to the courts in general and the Supreme Court in particular.

## 2.4 Division in the Criminal Code

The Criminal Code consists of three books. The first book is the general part with provisions on the scope of application of the code, on sanctions and measures, on defenses, on attempt and the extension of criminal liability through participation, on the reduction of sentences in case of concurrence, on the statute of limitations and on the non bis in idem principle. In the second and third book the core crimes and infractions are defined.

## 2.5 Criminal law for juveniles

There is no special statute on juvenile offenders. The Criminal Code, however, contains a number of special provisions on juveniles. These primarily concern the sanctions which can be imposed on juvenile offenders (sects. 77a through 77kk of the Criminal Code).

## 2.6 Other main criminal law statutes

The Dutch Criminal Code does not define all criminal offences. Numerous other statutes complete the criminal law legislation. The main statutes are the 1950 Economic Offences Act, the 1994 Road Traffic Act, the 1928 Narcotic Drug Offences Act and the 1989 Arms and Munitions Act. Violation of these Acts (e.g. drunk driving, hit-and-run, illegal possession of firearms, trafficking of drugs) constitutes a crime.
Furthermore hundreds of by-laws contain criminal provisions for the proper law enforcement of administrative legislation. The general part of the Criminal Code is also applicable to other criminal law statutes and criminal by-laws (sect. 91 CC).

## 2.7 Code language

The Criminal Code has been officially published in Dutch. There are, however, unauthorized translations of the Dutch Criminal Code in French, German and English.

- Code Pénal Néerlandais, in: M. Ancel and Y. Marx, Les Codes Pénaux Européens, Tome III, Centre Français de droit comparé, Paris 1958, pp. 1375-1466.
- Das niederländische Strafgezetzbuch, translated by D. Schaffmeister (in: H.H. Jescheck and G. Kielwein, *Sammlung ausserdeutsche Strafgezetzbücher*, Band 18, de Gruyter, Berlin 1977.

— The Dutch Penal Code, translated by L. Rayar and S. Wadsworth, in: The American Series of Foreign Penal Codes; no. 30, Rothman Littleton, Colorado 1997.

# 3

# The Dutch Code of criminal procedure

## 3.1 History

In the Netherlands the Napoleonic *Code d'instruction criminelle* was applied until 1838, however, with some modifications. For example the French jury system has never been adopted in the Netherlands. The Dutch Code of Criminal Procedure, which came into force in 1838, was not really a new code, but rather a translation of the French Code. The numerous attempts to reform the Code of 1838 and to restrict the inquisitorial elements of this Code failed, until the present Code of Criminal Procedure was enacted in 1926.

## 3.2 Characteristic of the Code of Criminal Procedure

In the motives of the Code of Criminal Procedure the code is characterized as 'being tempered accusatorial'. In comparison with the 1838 Code the new code gave the offender more procedural rights to influence the course of justice. At an early stage in the investigative phase the offender got the right to be assisted by his counsel with whom he can have free oral and written communication. The offender also got the right to remain silent when being interrogated. He, furthermore, got the right to be informed on the results of the investigations by the police or the examining judge and to interfere in these investigations, however, with restrictions. In order to prevent an abuse of the procedural rights by the offender, these rights could be restricted 'in the interest of the investigations' by the public prosecutor or the examining judge. Restrictions of the rights, however, can be reviewed by higher judicial authorities.
According to the Code the emphasis of the criminal procedure lies in the court trial where the immediacy principle is the leading principle. At the court-trial as a rule the evidence must be produced on the basis of this principle. In 1926, however, the Supreme Court ruled that a *testimonium de auditu*, hearsay evidence, is admissible. Later also other exceptions on the immediacy principle, such as the use of statements of anonymous witnesses as means of evidence were ruled to be admissible, provided that circumstantial evidence is present.
Under the influence of decisions by the European Court on Human Rights recently the immediacy principle began to play again an increasingly important role in the Dutch criminal procedure. Today the adversarial character of the court trial is increasingly stressed.

## 3.3 Division in the Code

The Code of Criminal Procedure is divided into five books.
The first book contains provisions on the competence of the police, the public prosecutor and the judiciary, on the rights of the defendant and the defense counsel and on coercive measures such as pre-trial detention, seizure or search of the premises.
The second book contains the legal provisions on the pre-trial and the trial stage.
The third book deals with legal remedies such as appeal and cassation.
The fourth book contains special criminal procedure provisions on juveniles and corporate bodies. The last book contains provisions on the implementation of court decisions.

## 3.4 Major procedural law reforms

The Dutch Code of Criminal Procedure has been reformed considerably over the last few years. In the past the code was regularly supplemented and changed, but the current revisions are of such a nature that the question has already been raised whether it is time for a comprehensive law reform, as has recently taken place in countries like Italy, Norway and Portugal.
However, a full law reform in which the general principles of the criminal procedure are reconsidered does not seem necessary or desired. The CCP establishes a balanced allocation of power and rights to parties in a criminal court procedure. There is no need for a re-allocation of competence.
The recent law reforms did not result in a substantially different position of the parties in court, or in an essential shift in competence. A full revision is not desired either, because from the point of view of the working situation in the administration of criminal justice, many objections are involved. The present pressure on the criminal justice practice is too high to work with a completely new Code. This would have the result that the administration of criminal justice would get overheated.
This was also the point of view of the Minister of Justice, as expressed in a memorandum to Parliament, in which he extensively dealt with the present state of the Code of Criminal Procedure law reform.
'No' to an integral law reform does not mean that the Code is not involved in a permanent process of reform. There are a number important reasons for major changes: the age of the Code, the technological progress, the impact of international human rights instruments and the 1996 Parliamentary Enquiry on police investigation methods.

## 3.5 Main reasons for procedural law reforms

*The age of the Code*

The Code dates from 1926 and reflects a sphere of a careful consideration of interests and competences of the classic court room participants, the suspect and his defense counsel, the police and the prosecution service.
However, the legal position of witnesses and victims was not elaborated at all or very insufficiently. Civil compensation (*action civile*) in criminal proceedings was unknown. Furthermore, private prosecution by victims is impossible, because according to Dutch law the prosecution service is vested with an absolute prosecution monopoly. Thus the victim of a criminal offence had been allotted a very modest place in the Code.
Ever since the 1993 Victim Compensation Act, the victim's position is considerably strengthened because now he can institute a lawsuit to claim civil compensation in the criminal proceedings.
The legal position of the witness has also changed. The phenomenon of the threatened witness, who refuses to meet his legal obligation to testify for fear of retaliatory measures, has been recognized only recently. Since the 1993 Threatened Witness Act, a witness protection scheme is now provided.

*Technological progress*

New technical developments enabled the use of advanced technical means of coercion in the fight against organized and serious criminality. In this connection, two recent changes may be indicated.
Firstly, by the 1993 DNA Act introduced the possibility, in case of serious suspicion of a crime which carries a statutory imprisonment of 8 years or more, to take blood for a DNA test for identification without the suspect's approval but by order of the examining judge.
Secondly, the 1993 Computercriminality Act introduced the possibility to intercept all forms of tele-communications and the possibility to intercept all forms of communications by means of long-distance target microphones.

*The impact of the international human rights instruments*

The third cause of recent changes is the need to meet the demands stemming from international human rights instruments concerning persons accused of crimes and of persons deprived of liberty, in as far as rules of these instruments are directly applicable under Dutch law.
There is no constitutional court in the Netherlands, and section 120 of the Dutch Constitution explicitly prohibits a constitutional judicial review of Acts of Parliament (statutes) by the courts: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts". However, the Dutch Constitution

obliges the courts to review all domestic legislation, including Acts of Parliament, with regard to their compatibility with directly applicable provisions of international treaties to which the Netherlands are a contracting party, such as the European Convention on Human Rights.
All provisions in this Convention that do not need further legislative implementation or operationalisation are regarded as directly applicable. Where a Dutch statutory provision is found to be in conflict with a directly applicable provision of the Convention, the court shall apply the provision of the Convention instead of the national provision. Section 94 of the Constitution reads: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions".
Standards on the application of directly applicable provisions of the Convention elaborated in case-law by the European Human Rights Court in Strasbourg shall be applied as well by Dutch courts. This is not only the case with regard to ECHR decisions ruled against the Netherlands, but also with regard to decisions ruled against other Member-States of the Council of Europe, in as far as these decisions contain standards on how to apply the provisions of the Convention. This means that not only decisions on cases against the Netherlands, but also other decisions of the court have an impact on Dutch criminal procedural legislation and trial practice.
The European Court on Human Rights' decisions in the Cubber and Hauschildt cases have resulted in the reform of the criminal procedure for juveniles. The Kruslin and Huvig cases have led to new procedural provisions for the interception of telephone communications, the Kostovski case led to the introduction of legislation on anonymous witnesses, and the Kamasinski case formed the reference for new legislation on interpretation and translation help during the criminal procedure, while the Brogan case has resulted in an advanced control of lawfulness of police custody.

*The recent crisis in the police investigation*

In 1996 the Parliamentary Enquiry Committee on police investigation came to the conclusion that the Netherlands was suffering a crisis in the investigation. No legal standards for police investigation methods were set. Neither the Court nor the prosecution service performed its role of supervisor of the police conscientiously enough, so the police got room to operate outside the authority and control of the prosecutor in charge. Quite often undercover policing methods were used that were in conflict with the rules of law in a democratic state. The report of the Committee caused a real shock to those responsible for the supervision of the Dutch police and have led to quite impressive legislation on investigative powers and on investigative methods, such as observation and tailing, police infiltration, running informers,

interception of communication by technical means, covert entry, pseudo-purchase and pro-active investigation.

### 3.6 Procedural criminal law in other Acts and international instruments

Some Acts, such as the 1950 Economic Offences Act and the 1928 Narcotic Drug Offences Act, include procedural law regulations that partly deviate from the Code of Criminal Procedure, concerning in particular searches of the premises and the procedure for seizures.
The Code of Criminal Procedure is not applicable to minor road-traffic offences. These are dealt with through administrative procedure without direct access to a criminal court. The Administration of Road-Traffic Offences Act of 1989 allows the police to impose an administrative fine. This decision may be appealed to an administrative agency (the prosecution service). Ultimately, access to a subdistrict administrative court is allowed.
There is no special statute on criminal procedure for juvenile offenders. The Code of Criminal Procedure contains special provisions on juvenile court trial (sects. 486 through 509). As a rule, trials in juvenile court are not open to the public.
The Netherlands has signed and ratified a number of (Council of Europe) Conventions dealing with procedural law issues, for instance the conventions on Mutual Assistance in Criminal Matters, on Transfer of Proceedings in Criminal Matters, on Extradition, on the International Validity of Criminal Judgements and on the Transfer of Sentenced Persons.

### 3.7 Code language

The Code of criminal procedure has been officially published in Dutch. No translations in other languages than in German are available: *Die niederländische Strafprozessordnung vom 1. Januar 1926*, Übersetzung und Einführung von Hans-Joseph Scholten, Freiburg im Breisgau: edition iuscrim 1999.

# 4

# The main organs of the criminal justice system

## 4.1 The police force

*Organization of the police*

The formal organization of the police force is laid down in the 1993 Police Act. Prior to this Act the police force was divided into a national police force and 148 municipal police forces.

Since the 1993 Police Act reformed the organization and main structures of the police service, the country is divided into 25 police regions. Each region has its own police force under the administrative management of the mayor of the largest or most central town in the region; the other mayors or burgomasters in the region participate in a supervisory council, however, with very limited powers. The regional police forces act under the final supervision of the Ministry of Interior.

Besides the regional police forces a small national police force exists. This police force consists of various units like the motorway police, the water police and the central criminal investigation and intelligence unit. The national police force acts under the final supervision of the Ministry of Justice because the main task of this force deals with the administration of criminal justice.

The criminal investigation police (*Regionale recherche dienst*) form a part of the regional police force but have a separate position within it. The criminal investigation police consist of the criminal investigation department (including its specialized units such as the criminal intelligence units). The regular police force has 48,000 employees, of whom 32,000 are police officers vested with the right to investigate criminal offences.

The main responsibility of the criminal investigation police is to investigate criminal offences, either on their own initiative or in response to reports from the public. Owing to the enormous "supply" of criminal offences, most of the time of the police is spent in processing information. As a result, the police forces in regions with major cities are often no longer in a position to devote sufficient time to traditional investigation.

In addition to the regular police service, there are special criminal law enforcement agencies both on the local and the national level, which are vested with the right to detect and investigate a restricted category of offences. These agencies form a part of the local or national administration.

On the national level there are special investigative agencies under the control of a governmental department such as Customs and Excise Investigative Office of the Inland Revenue Ministry and the Inspectorate for labor relations of the Ministry of Social Affairs and Employment. These special agencies have only investigative powers restricted to criminal offences related to matters of immediate concern to these Ministries.

*Tasks of the police force*

The task of the police force (sect. 2 Police Act) is to enforce the legal order and to assist those who need help. The enforcement of the legal order comprises the enforcement of criminal law, the enforcement of the public order and the performance of judicial services.
When enforcing the public order the police operate under the authority of the mayor who can give instructions in this respect to the police.
When enforcing criminal law and performing judicial services the police act under the authority of the prosecution service. The enforcement of criminal law comprises the effective prevention, termination and investigation of criminal offences. The prosecution service can give instructions to the police for the enforcement of criminal law.
There is no sharp division between the enforcement of the public order and the enforcement of criminal law, so it's not always clear under whose authority the police act. Therefore the mayor who has the administrative management of the regional police force regularly meets with the head of the regional police force and the (deputy) chief of the regional prosecution service (the so-called triangle meeting) to discuss questions such as the input of the police force to fight local criminality and improve local safety.

*Powers of the police force*

In relation to the task of the police to detect and investigate criminal offences the police are vested with specific statutory powers such as arrest, police custody, seizure. Some powers may only be excersized by senior police officers who have been designated as assistant public prosecutors (*hulpofficier van justitie*). An assistant public prosecutor is not a member of the prosecution service nor is vested with the powers of a public prosecutor, but he is vested with the power to use coercive measures, such as search and police custody.
The police may use violence in the exercise of their police tasks. Furthermore the police may carry out a body search if reasons for safety so require.
On the basis of the Police Act the police have the power to perform limited invasions of someone's privacy by means of surveillance or taking pictures of persons in public.

*Supervision over the police*

In the investigation of criminal offences, all investigating police officers are subject to the public prosecution service. Formally, the public prosecutor is the senior investigator (sects. 148 CCP and 13 Police Act). In practice, however, the police deal with most cases without prior consultation with the public prosecutor except in more important criminal cases where they may give detailed instructions. Otherwise consultation takes place on a more abstract level, in order to determine the policy for the investigation of certain kinds of crime and for the use of special investigation methods (undercover agents, infiltrators etc.). This is due to the rather restricted strength of the prosecution service as well as to the recognition that with regard to investigative techniques and tactics the police possess more expertise than the prosecution service.

There is also consultation in specific cases where police officers require the approval or cooperation of the public prosecutor or the examining magistrate for the use of certain means of coercion.

Until recently the prosecution service did not perform its supervisory role over the police properly. The police enjoyed much autonomy in their investigative activities in particular in the fight against organized crime.

A recent report by the Parliamentary Inquiry Committee on police investigation matters made clear that the police extensively used illegitimate undercover policing methods. In using those methods the golden rule: 'no competence without responsibility, no responsibility without accountability' was absent. The main reasons for this were: the lack of legislation and clear rules, the lack of authority and supervision by the prosecution service and the lack of organization in the police force fostered by the relative independence of the Criminal Intelligence Units, whose investigation was either sealed off – only to be disclosed by the public prosecutor in court – or remained secret. Due to the conclusion of the Parliamentary Inquiry Committee and the ensuing Parliamentary debate a set of rules on investigative police methods is currently before Parliament.

Furthermore a reorganization of the prosecution service took place in order to improve the supervisory role of the prosecution service over the police.

*Instructions to the police*

The public prosecutors have taken a more active part in investigative work by issuing written or oral instructions to the police on the investigation of specific offences. This may be a result of the increasing complexity of the cases and the lack of financial resources, which has made it necessary to set priorities when instituting investigations. Furthermore, the Supreme Courts rulings on inadmissible evidence have increasingly stressed the importance of the public prosecutor in ascertaining as early as possible what methods should be employed in the investigation.

It follows from the above that the criminal investigation police are largely responsible for investigating the facts and ascertaining the truth. The majority of criminal offences, which come to trial, are prosecuted only on the basis of the information collected by the investigating police officers.

## 4.2 The prosecution service

*Organization of the prosecution service*

The prosecution service is a nation wide organization of prosecutors. It's organized hierarchically at the top of which is the Board of Prosecutors-general. The service functions under the responsibility of the Minister of Justice, but it is not an agency of the Ministry of Justice. The service is part of the judiciary.
The organization of the prosecution service is regulated by the 1827 Judicial Organization Act. Recently the prosecution service has been reformed considerably.
The total number of prosecutors is around 450. One quarter of all prosecutors is female. Prosecutors are recruited in the same way as judges. They belong to the judiciary but unlike judges they are not appointed for life. Public prosecutors are appointed by the Crown and retire at the age of 65.
Unlike other members of the prosecution service the Procurator-General attached to the Supreme Court is an independent official appointed for life, with mandatory retirement at the age of 70 (sect. 117 Dutch Constitution).
The prosecution service is organized in two layers corresponding with the court in first instance and the courts of appeal.
The prosecution service attached to the district court serves the sub-district courts in the jurisdiction of the district court as well. At the district court level the prosecution service consists of prosecutors with the rank of the chief public prosecutor, senior public prosecutors, public prosecutors and substitute public prosecutors. At the court of appeal level the service consists of the chief Advocate-General and the Advocates-General.
The prosecution service attached to the Supreme Court is not part of the hierarchy of the prosecution service. It forms an independent unit with special tasks and powers. At the Supreme court level the prosecution service consists of the Procurator-General and Advocates-General.

*National prosecution office*

There exists also a national prosecution office located in Rotterdam, which supervises the national criminal investigation unit and prosecutes cases investigated by this unit. Furthermore the national prosecution office develop the investigation and prosecution policy with regard to (international) organized crime.

*The Board of Prosecutors-General*

There is no hierarchical relation between prosecution services of the courts in first instance and the prosecution services of the court of appeal. Both are subordinated to the Board of Prosecutor-General. The board directs the prosecution service as one organization.

The prosecution service is headed by a board of three to five Prosecutors-General (*college van procureurs-generaal*). The Crown appoints the chairman of the board. The Board has its office (*het Parket Generaal*) in The Hague. The Board of Prosecutors-General may give instructions to the members of the prosecution service concerning their tasks and powers in relation to the administration of criminal justice and other statutory powers, e.g. supervision of the police. Such an instruction may be of a general criminal policy nature or of individual nature. Prosecutors are legally bound by these instructions.

The highest authority over the investigation and prosecution rests with the Board. The Board ultimately supervises the implementation of a proper prosecution policy by the prosecution service and a proper investigation policy by the police.

*Main duties and power of the service*

The main task of the prosecution service is to administer by means of criminal law the legal order. The prosecution service plays a pivotal role in the administration of criminal justice. The decisions made by the public prosecutor involve profound consequences for the offender and repeated refusals to prosecute certain crimes may also lead to a decline in the detection and investigation of offences by the police. In turn, the charges laid against the accused largely delineate the adjudicatory functions of the courts.

It is no exaggeration to say that the Dutch prosecution service has great power at least in dealing with the cases that come before it. It has a monopoly over prosecutions and employs the expediency principle in this connection. Furthermore, it makes use of its hierarchical structure to pursue a coordinated policy. In this way, the prosecution service is able to determine systematically what cases should be brought to trial and what sentences the courts should be asked to impose.

Since the introduction of the present Code of Criminal Procedure in 1926, the decision to institute criminal proceedings has been reserved solely to the prosecution service. Approximately one-half of the crimes, which reach the public prosecutor's office through the intermediary of the police, are not brought to trial, but are instead disposed of by the prosecution service itself. Usually this is done by a decision not to prosecute through a dismissal due to technicalities or through a dismissal due to the use of the expediency principle or by a settlement out of court by means of a transaction.

If the prosecution service decides to refer the matter to the criminal court, suspects in simple, less serious kinds of crimes will generally be summoned by the public prosecutor exclusively on the basis of the information obtained in the police investigation. In cases of more complicated and serious crimes, the public prosecutor may apply to the examining judge for a preliminary judicial investigation. When the preliminary investigation conducted either by the police or by the examining judge is completed, it is once again the public prosecutor who must decide whether or not to prosecute or to continue the prosecution.
If the suspect is notified by the public prosecutor that no charges will be brought (either conditionally or otherwise), the case is terminated, unless fresh incriminating evidence is discovered later.
If the public prosecutor decides to prosecute, (i.e. if a notification of further prosecution or a summons is issued), the accused can lodge a written notice of objection with the district court. The objection procedure enables the suspect to challenge in a non-public setting (i.e. *in chambers*) what may be a rash or unjust prosecution, and thereby avoid being exposed to a public trial.
This judicial review of the decision to prosecute is fairly limited. In the great majority of cases the notice of objection procedure results, after a brief investigation, in a decision by the judge in chambers that the case should go to trial after all. Should the court find that a prosecution is unjustified, the case will be dismissed. Otherwise the case is prepared for trial. The grounds on which the prosecution may be dismissed are limited to four:
— where the case is to be dismissed because the prosecutor doesn't have the right anymore to prosecute e.g. due to the statute of limitations;
— where the evidence against the accused is manifestly insufficient;
— where the act does not constitute a criminal offence and
— where the accused is not liable e.g. due to self-defense.
The main statutory tasks of the members of the prosecution service attached to the Supreme Court is:
— to prosecute members of Parliament, ministers and deputy ministers for criminal offences committed in the exercise of their function;
— to advise the Supreme Court in all cases dealt with and to give their legal opinion on disputed legal questions;
— to appeal in cassation in the interest of the proper application of criminal law.
The Procurator-General is in particular charged with supervision of the enforcement and implementation of statutory rules by the courts.

*Political accountability*

The prosecution service is a dependent body in the sense that the Minister of Justice is politically accountable for the policy of the prosecution service and can be called to account in Parliament for intervening or failing to intervene in this policy. He can

be questioned by Parliament both for the prosecution policy at large and for individual prosecutorial decisions. This political accountability is one of the core elements of the Dutch Rule of Law State.
The Minister of Justice is therefore involved in the formulation of the prosecution policy at large. There are regular contacts between the Minister and the Board of prosecutors-general in this respect. The Board of prosecutors-general is responsible for the proper realization of the prosecution policy as agreed upon with the Minister of Justice. The Board issues instructions in this respect. In the decision making in individual cases the Minister may be involved as well. He may be consulted by individual prosecutors in cases where the prosecutorial decision may have an impact on the general prosecution policy or where his political accountability is at stake e.g. euthanasia policy. The final responsibility rests with the Minister of Justice.
Therefor section 127 of the Judicial Organization Act vests the Minister of Justice with the power to give general or specific instructions on the exercise of tasks and powers of the prosecution service.
The Minister may give instructions on investigation and prosecution in individual cases as well. Before the Minister can issue such an instruction the Board of prosecutors-general has to be consulted. The instruction must be reasoned and issued in written form.
The officials of the prosecution service are required to follow those instructions. As a rule such an instruction has to be added to the files together with the views of the Board of prosecutors-general in order to give the Court full information. A ministerial instruction not to prosecute or not to investigate a criminal offence has to be sent to Parliament together with the view of the Board.
The need of democratic control increased over the last decades since the prosecution service got more adjudicatory powers and only a restricted number of criminal cases were brought to trial.
Although the power of the Minister of Justice to issue instructions under section 127 is unrestricted the Minister will use this power rarely. In most cases consultation with the Board of prosecutors-general will have the effect that the Board will issue such an instruction. Only in cases where the Board disagrees with the opinion of the Minister will he use this power, however, sparingly.
The Minister can not give orders to the Procurator-General at the Supreme Court, who holds an independent position. This is due to the fact that he is vested with the right to prosecute members of parliament, ministers and deputy ministers for crimes committed in the exercise of their functions when Parliament requests such a prosecution (sect. 119 Dutch Constitution).

## 4.3 The courts

*Organization of the court system*

The organization of the court system is regulated by the Judicial Organization Act, which was enacted in 1827. There have been no major reforms of this statute since 1945, except that the military courts were abolished in 1991 and their function was taken over by the subdistrict and district court at Arnhem.

At present there are two kinds of courts in the Netherlands: ordinary and special administrative courts. The ordinary courts are by far the most important. They deal with three classes of cases, criminal, administrative and civil cases, at four different levels. The special courts deal with specified administrative law cases. There is no constitutional court in the Netherlands.

At present there is a total of around 1800 (f.t.e.) judges in the Netherlands. Of these around one quarter are female.

Judges are appointed for life by the Crown, and retire at the age of 70.

Criminal offences are dealt with by criminal courts at four levels.

The lowest level is the subdistrict court (*Kantongerecht*). The Netherlands is divided into 62 subdistricts. Most subdistrict courts have only one judge.

The second level in the court organization is the district court (*Arrondissements-rechtbank*). There are nineteen such courts, each covering three or four cantons. The district courts differ greatly in size. The size depends mainly on the number of inhabitants of the jurisdiction.

The third level is the Court of Appeal (*Gerechtshof*), of which there are five. The highest level is the Supreme Court (*Hoge Raad*) in The Hague.

*Lay participation*

There is no jury system in the Netherlands. Criminal justice is administered by legally qualified career judges and public prosecutors.

There is thus no participation by lay persons except in two cases:

— the military division of the district court and Court of Appeal in Arnhem consist of two professional judges and one military lay judge, and
— the penitentiary division of the Court of Appeal in Arnhem, which hears penitentiary issues such as the refusal of early release, consists of three professional judges and two experts in the behavioral sciences.

*Jurisdiction*

There are two courts of first instance, the subdistrict courts and the district courts. Subdistrict courts try infractions committed in their jurisdiction by adults and juveniles, unless the District Court is competent. One crime – stealing crops, deadwood, clay etc. (sect. 314 CC) is tried by the subdistrict court as well.

District courts try crimes committed in their jurisdiction and some infractions (e.g. related to taxes and drugs). The district court tries furthermore economic offences – both infractions and crimes.
There are two appelate courts, the district court and the Court of Appeal. The district court is the appellate court for decisions by the subdistrict court; the Court of Appeal is the appellate court for district court decisions.
Unlike the other courts the Supreme Court does not deal with the facts but reviewes the lawfulness of judgements of lower courts and the manner of proceedings. Exceptionally the Supreme Court is court of first and last instance. Where members of parliament, ministers and deputy ministers have to be tried for offences committed in the exercise of their functions, the Supreme Court is competent to try these cases. Up to now such a trial has never taken place.

*Composition of criminal courts*

Infractions as a rule are tried by a single judge of a subdistrict court. Crimes are tried either by a full bench of three judges or by a single judge of a district court. The more serious cases are dealt by a full bench. If the public prosecutor considers the criminal case to be a comparatively minor one and requests a prison sentence not exceeding six months, he can prosecute before the so-called police court, a single judge chamber of the district court. The police court may not impose prison sentences of over six months. The police court is entitled to refer a case to the full bench criminal division if he is of the opinion that a full bench would be more appropriate. Furthermore, nearly all economic crimes and environmental crimes are tried by a single judge (economic police court) and nearly all juvenile criminality is tried by the single judge of the juvenile court.
The Court of Appeal sits in three judge or one judge chambers.
As a rule the Supreme Court hears a case with a bench of five judges. It may hear a case with a bench of three judges as well, where the Supreme Court deems that the review of the case cannot result in cassation or when no legal questions are at stake.

*The Supreme Court*

The highest court in criminal matters is the Criminal Chamber of the Supreme Court. It is competent to review a decision in cases where the law has been improperly applied or the rules of due process and fairness of the procedure have been violated. Both the defendant and the prosecution service have the right to appeal in cassation to the Supreme Court against all criminal judgements of lower courts against which no other remedy is open or against which such remedy has been open, with the exception of acquittal.
Where the Supreme Court quashes the judgement due to an error of law, the case, as a rule, is remitted to the court whose judgement was quashed. In cases of a

procedural error the Supreme Court remit the case to another court. The court of remittance is bound by the decision of the Supreme Court.
The Supreme Court can also give a decision in cases, which the parties themselves have not submitted. This is possible when the Procurator-General at the Supreme Court *sua sponte* submits a case to the Supreme Court to decide a matter of principle even though no appeal in cassation has been lodged. This so-called cassation in the interests of law (*cassatie in het belang van de wet*) is intended to ensure the uniformity in the administration of criminal justice by the courts.

*Precedents*

The Supreme Court can play a guiding role in the administration of criminal justice through its powers to give decisions of principle on certain criminal issues. Because of their status as independent courts, however, lower courts are not compelled to follow the views of the Supreme Court. Even so, they will generally follow precedents, since the Supreme Court does not readily deviate from previous rulings. Although there is no statutory rule on precedents, the lower courts do in fact follow the Supreme Court rulings.

## 4.4 Probation Service

*Organization of the probation service*

Since 1823 when the Dutch Association for the Moral Improvement of Prisoners was established as a private initiative, the Dutch probation system was extended by a number of, sometimes religious, associations, all focussing on the three main tasks for the probation service: cell visits, the provision of social enquiry reports and the provision of after care.
In the past decades reorganizations in the probation service took place in order to increase their efficiency in spite of budget cuts.
At present the Dutch probation Service consists of three national probation organizations: the Dutch Probation Foundation, the probation department of the Salvation Army and the National Organization specializing in programs for addicted people.
The Dutch Probation Foundation has five branch offices and fifty-four executive units and is by far the largest probation organization. The Foundation is governed by the 1995 Probation Rules. The Foundations' responsibility is to assure that in each of the district court jurisdictions the statutory probation activities are performed by probation agencies. For those activities the Foundation annually receives a budget from the Ministry of Justice (± 90 million US$).

*Main functions*

The main functions of the probation service are laid down in section 8 of the 1995 Probation Regulation:

— the provision of early help, consisting of providing provisonal social enquiry reports on the offender to the police, the prosecution service and the judge in case the person in question has been arrested by the police and pre-trial detention is considered,
— the provision of social enquiry reports at the request of the criminal justice agencies, of the offender or on the initiative of the probation service in order to enable the agencies to make decisions,
— the provision of aid and support to suspects of crime and to convicts either on the initiation of the probation institution or on the request of the suspect or convict,
— assisting the offender at the court session,
— assisting the offender with behavioral difficulties,
— providing probation activities in penitentiary establishments and during after care,
— preparing and implementing community sentences and substitutes to imprisonment such as electronic monitoring and community service orders, including supervision of compliance with community sentences and providing information to the competent authorities on compliance.

*Role of volunteers*

There are two kinds of volunteers in probation activities:

— individual volunteers who, at the request of the probation foundation, cooperate in carrying out the statutory probation tasks, and
— organizations of volunteers who initiate and develop projects which are closely related to the statutory probation activities.

## 4.5 The prison service

*Organization of the prison service*

The enforcement of prison sentences is a statutory task of the prosecution service (sect. 4 of the Judicial Organization Act) but is actually carried out by the Prison Service (Dienst Justitiële Inrichtingen) operating a computerized cell-allotment system.

The prison service is an agency of the Ministry of Justice. The service has to ensure a safe, efficient and humane enforcement of custodial sentences and measures. The prison organization is a deconcentrated one.

The strategic prison policy is developed by the Minister of Justice, who is politically accountable for the development of the prison policy. The prison service translates

the strategic prison policy into an operational policy. The policy is implemented by the prison governor and his or her assistants. The division between policy making and policy implementation has been very favorable for the prison organization, because the prison management teams get ample opportunities to make their own decisions in personnel, financial and material matters as each of the penitentiary establishments gets its own budget.

## 4.6 The Bar and legal counsel

*The Dutch Bar Association*

Assistance in criminal matters and legal aid is provided by lawyers registered at a Dutch district court or by lawyers from other European Union countries, provided they cooperate with a Dutch registered lawyer.

A university degree in law and further professional training is the legal qualification for registration. The number of registered lawyers is around 9100 (25% of whom are female). Registered lawyers practice their profession in a self employed capacity. There are around 2500 law firms. A rather restricted number are solely defense lawyers.

All registered lawyers have to be members of the Dutch Bar Association. The General Board of the Association under the presidency of the Dean is elected by the members of the Assembly of Deputies who are elected by the regional bar associations. The General Board promotes the proper practice of law by lawyers and may take all measures in this respect.

All registered lawyers are subject to disciplinary law regulations issued by the Association.

Disciplinary jurisdiction is carried out by Disciplinary Councils in first instance and by the Court of Discipline in appellate cases. Disciplinary sanctions may be imposed for acts and failures of registered lawyers which are in conflict with the proper care a lawyer has to provide to those whose interests he has to serve and for acts and failures which are unbecoming of a registered lawyer.

Admission to the profession, the powers and duties of registered lawyers, the organization of the Bar and disciplinary law are regulated in the 1952 Bar Act.

In the strict sense, defense counsel are not bodies under public law or even an official part of the criminal justice system. Such institutions as public defenders are unknown in the Netherlands.

Lawyers are, nevertheless, in many respects very definitely dependent upon the judicial organization in the widest sense of the word in order to conduct an effective defense both at the trial and in the preliminary investigation.

*Legal aid*

Under the Code of Criminal Procedure a defendant is at all times entitled to choose one or more defense counsel. In principle the defendant has to pay for any defense counsel chosen in this way.

The Code also allows appointment of defense counsel in cases involving indictable offences. In such cases the fee is paid by the criminal justice authorities. A counsel is assigned automatically in cases involving deprivation of liberty. Once a suspect has been detained in police custody, he or she is given legal assistance by the counsel on duty. Such an appointment is then confirmed *ex officio* by the president of the district court when the suspect is remanded in custody.

Furthermore, a defense counsel may be assigned by the District Legal Assistance Council on request in order to represent a suspect with a low income. The rules on legal aid are regulated in the 1993 Legal Aid Act.

As a result, lawyers acting in criminal cases are generally assigned to the suspect. Defense counsel charge fees calculated in accordance with fixed rates. Clearly, the system for the appointment of defense counsel and the size of the fees are factors which affect the degree of commitment of defense counsel.

# 5

# Issues of criminal law

## 5.1 Definition of criminal offence

The Criminal Code does not give a definition of the concept of a criminal offence. It deals with the conditions that have to be met before an offender can be punished and provides the statutory definitions of the various punishable conducts. The statutory definition of an offence contains to constituent elements of the criminal offence. The constituent elements must be summed up by the public prosecutor in his charge and the presence of these elements must be proven by the facts presented by the prosecution service before a court may sentence the offender. Where a constituent element is missing in the charge, a discharge (*ontslag van rechtsvervolging*) must follow.
Where the public prosecutor can not prove by evidence that the charge is matched by the facts an acquittal (*vrijspraak*) must follow.
In practice an offender whose conduct falls within the statutory definition of an offence is criminally liable. In the charge the absence of defenses does not have to be summed up. The substantive criminal law legislator presumes that in most cases defenses will not apply. If there are indications that a defense may apply – mainly the offender will raise his defense – the court has to ascertain whether the defense applies. If so the court has to discharge the accused.
The statutory elements of a criminal offence play an important role in substantive criminal law, due to the legality principle.

## 5.2 Principle of legality

The principle of legality is established in the Criminal Code. Section 1 reads "No conduct constitutes a criminal offence unless previously statutorily defined in criminal statutes". The legality principle is a guarantee against arbitrary administration of criminal justice and offers a high degree of legal certainty. The principle guarantees that no court may create new criminal offences by an analogous interpretation of criminal law provisions.
The principle furthermore guarantees that new criminal law provisions may not be retroactive. The prohibition of retro-activity is not applied if new criminal provisions replace old ones, and the re-definition of the criminal offence is to the advantage of the offender or the reduction of the maximum sentence to be imposed is the result of a change of the legislators views on the punishability of the offence.

The principle of legality, furthermore, requires that only penalties specified by statutes may be imposed.

## 5.3 Classification of offences

All criminal offences are classified as either crimes or infractions. There is no clear and conclusive qualitative criterion (such as *mala in se* versus *mala prohibita*). The division is used for all criminal law statutes. The legislature decides whether an offence constitutes a crime or an infraction. The classification of offences is decisive for the question by what court the criminal offence must be tried: crimes (as a rule) are tried by the district court and infractions are tried by a subdistrict court. The classification, furthermore, is relevant, because an attempt to commit an infraction or complicity as an accessory to an infraction does not constitute criminal liability.
Recently legislation has been adopted according to which minor traffic offences, which used to constitute a criminal offence coming under the jurisdiction of the subdistrict court, constitute an administrative offence to be administered through an administrative procedure without direct access to a court. Such an administrative offence is administered by the police through an administrative fine. The maximum fine is Dfl 500. The police officer's decision to impose an administrative fine is final if, within a certain period of time, no protest is filed with the prosecution service. In the latter case the public prosecutor has to re-examine the case and can revoked the police officer's decision. Where the public prosecutor reaffirms the administrative fine one may appeal to the subdistrict court judge who acts as an administrative judge.
It's very likely that the administrative procedure in the near future will be extended to other minor offences.

## 5.4 Legal definitions of some major crimes

Intentional homicide (sect. 287 Criminal Code): Anyone who intentionally takes the life of another person is guilty of homicide and liable to a term of imprisonment not exceeding 15 years or a fine of 100,000 Dfl.
Murder (sect. 289 Criminal Code): Anyone who intentionally and with premeditation takes the life of another person is guilty of murder and liable to life imprisonment or a term of imprisonment not exceeding 20 years of imprisonment or a fine of 100,000 Dfl.
Assault (sect. 300 Criminal Code): Physical abuse is punishable by a term of imprisonment not exceeding two years or a fine of 25,000 Dfl.
Theft (sect. 310 Criminal Code): A person who removes any property belonging in whole or in part to another, with the object of unlawfully appropriating it, is guilty

of theft and liable to a term of imprisonment not exceeding four years or a fine of 25,000 Dfl.
Robbery (sect. 312 Criminal Code): Theft preceded, accompanied or followed by an act of violence or threat of violence against persons, committed with the object of preparing or facilitating the theft or, when the offender is caught red-handed, of either securing escape for himself or for others participating in the serious offence, or of securing possession of the stolen property, is punishable by a term of imprisonment not exceeding nine years or fine of 100,000 Dfl.

## 5.5 Minimum age of criminal responsibility

The minimum age of criminal responsibility is 12 years. Children under 12 years of age cannot be prosecuted for criminal offences but Civil Code measures, such as a referral to a juvenile treatment center, may be applied.
To juveniles between 12 and 16 years of age, juvenile criminal law is applicable.
To juveniles aged between 1 6 and 18 in principle criminal law is applied but the juvenile court may apply adult criminal law where it finds grounds to do so by reasons of the gravity of the offence, the character of the offender or the circumstances in which the offence was committed. For the same reasons to adults aged between 18 and 21 juvenile law may be applied in stead of adult criminal law. The statutory age of adulthood is 18 years of age.
There is no statutory maximum age of criminal responsibility, although old age may be taken in consideration by the public prosecutor when deciding whether or not to prosecute a crime.

## 5.6 Causation

Although according to many statutory definitions of offences, the causing of harm of a particular kind constitutes a criminal offence – see e.g. the statutory definition of murder – the Criminal Code does not define the circumstances under which an act may be perceived as the cause of a result.
The criterion for causation is developed in the Supreme Courts' case law. Initially the Court used as the criterion for causation the reasonable foreseeability of the result.
Today the Court applies the criterion of reasonable imputability in its case law. The foreseeability of the result is still an important factor as is the factor that no other act may predominantly have influenced the result.

## 5.7 Mental elements

The statutory definition of crimes contains as a rule a mental element (e.g. intent or negligence). This mental element must be present in order to constitute criminal liability and must be proven by the public prosecutor before the court may sentence the offender. Absence of the evidence on the presence of the mental element leads to an acquittal. The concept of strict liability is unknown in Dutch criminal law.
Where the mental element is not part of the statutory definition of the criminal offence, which is as a rule the case for infractions, the mental element is presumed to be present unless there are indications that the element is absent.
The absence of the mental element in such a case leads to a discharge due to the absence of criminal liability.
It's a major principle of Dutch criminal law that there is no criminal liability without culpability or blameworthiness (*geen straf zonder schuld*).

## 5.8 Culpability

Two forms of culpability are distinguished: intent (*opzet*) and negligence (*schuld*). Intent includes acting willingly and knowingly as well as acting in the awareness of a high degree of probability. Intent may be present in the form of a *dolus eventualis*, which is the case where the offender willingly and knowingly accepts a considerable chance that a certain result may ensue. The dolus eventualis-doctrine is quite often applied in court practice.
Negligence includes both conscious and unconscious negligence. The former is present when the offender is aware of a considerable and unjustifiable risk that the element exists or will result from the act but thinks on unreasonable grounds that the risk will not materialize.
Unconscious negligence is present when the offender was not aware of the risk but should have been aware of it (carelessness or thoughtlessness).

## 5.9 Justification and excuse

The Criminal Code contains a number of provisions establishing defenses. In addition to these statutory defenses, there are two non-statutory defenses, which have been developed in the case law of the Supreme Court.
The Criminal Code does not distinguish between justification and excuse. In both cases according to the Criminal Code the offender is not criminally liable. The distinction between justification and excuse is made in criminal law doctrine.
The prevailing view at present is that justifications concern the lawfulness of the act whereas excuses concern the blameworthiness. If grounds for justification are present, the violation of the law does not constitute a criminal offence. If grounds

for excuse are present, the violation of the law constitutes a criminal offence, but the offender cannot be blamed for having committed the offence.
All defenses may be invoked with respect to all offences; no single offence is excluded.
The statutory grounds for justification are:
— necessity (sect. 40 Criminal Code),
— self-defense (sect. 41 Criminal Code),
— public duty (sect. 42 Criminal Code) and
— obeying the official order of competent authority (sect. 43 Criminal Code).
The requirements of subsidiarity and proportionality have to be met when accepting a justification defense.
The statutory grounds for excuse are:
— insanity (sect. 39 Criminal Code),
— duress (sect. 40 Criminal Code),
— excessive self-defense (sect. 41(2) Criminal Code), and
— obeying an order issued without authority (sect. 43(2) Criminal Code).
Two additional defenses have been developed in case law. The first one, the absence of substantive unlawfulness, leads to justification; the other one, the absence of all blameworthiness due to ignorance (mistake of facts or mistake of law), leads to excuse; in both cases according to the Criminal Code the offender is not criminally liable.

## 5.10 Justification defenses

*Necessity (noodtoestand)*

Section 40 Criminal Code reads: Anyone who commits an offence as a result of a force he could not be expected to resist is not criminally liable.
On the basis of the history of the Code the Supreme Court ruled that this section includes necessity.
Necessity is a situation in which a person has to choose between conflicting duties 'If the person in such a situation obeys the most important one and violates by doing so the criminal law his act is justified' according to the Supreme Court. In this formulation the principles of subsidiarity and proportionality are expressed.

*Self-defense (noodweer)*

Section 41 Criminal Code reads: Anyone who commits an offence where this is necessary in the defense of his person or the person of another, his or another person's integrity or property against immediate unlawful attack is not criminally liable.
As a rule one may not take justice in one's own hands but in the case of an unlawful attack one may repel force by force provided that there is no other convenient or

reasonable mode of escape (subsidiarity). The amount of force must be reasonable (proportionality). In assessing whether the force was reasonable the criminal court may take the personal characteristics of the offender into consideration.

*Public duty and official orders (wettelijk voorschrift en ambtelijk bevel)*
Section 42 Criminal Code reads: Anyone who commits an offence in carrying out a legal requirement is not criminally liable.
Section 43 Criminal Code reads: Anyone who commits an offence in carrying out an official order issued by a competent authority is not criminally liable.
In both cases impunity is guaranteed because the person acted on the authority of a governmental body or public officer.

*Absence of substantive unlawfulness (afwezigheid van materiële wederrechtelijkheid)*
This justification defense is developed by the case law of the Supreme Court. In 1933 the Court ruled the even though unlawfulness is not an element in the statutory definition of the offence (thus unlawfulness has not to be proved) the offender cannot be convicted where his act does not result in a substantive unlawfulness. This is the case when an act (which is in conflict with the law) serves the same interest as is guaranteed by the law. The legal impact of this non-codified justification is restricted. Since 1933 the Court did not repeat its ruling.

## 5.11 Excuse defenses

*Insanity (ontoerekenbaarheid)*
Section 39 Criminal Code reads: Anyone who commits an offence for which he cannot be held responsible by reason of a mental defect or mental disease is not criminally liable.
No statutory standards or case law standards are set for determining insanity, but in practice a person is not held responsible for his criminal conduct if at the time of such conduct as a result of a mental defect or disease he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to bring his conduct into confirmity with the requirements of law.
In assessing whether the offender can not be held responsible the court makes use of reports by psychiatrists.

*Duress (overmacht)*
Section 40 Criminal Code encompasses both necessity and duress. An offender who acts under the pressure of an external force he reasonably could not resist is excused. The external force may be an unlawful threat from another person or a natural force.

If someone acts under the pressure of a force caused by his moral conscience, he does not have the defense of duress. In case of duress the will of the offender is impaired to such a degree that he can not be blamed for his act.

*Excessive self-defense (noodweerexces)*

Section 41(2) Criminal Code reads: Anyone exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable.

When the unlawful attack causes strong emotions such as rage, anger, fear or desperation, the attacked person may not react properly by using a reasonable mode of escape. Due to the emotions he may overreact and use an amount of force that is disproportionate. Due to the strong emotions the offender's will is impaired so that he can not be blamed for his act.

*Obeying an unlawful order (onbevoegd gegeven ambtelijk bevel)*

Section 43(2) Criminal Code reads: Obeying an official order issued without authority does not remove criminal liability unless the order was assumed by the subordinate in good faith to have been issued with authority and he complied with it in his capacity as subordinate.

Good faith may be both subjective and objective. The latter means that there is still a responsibility on the subordinate to be prudent and in case of doubt to refrain from obeying the order.

*Absence of all blameworthiness (afwezigheid van alle schuld)*

In line with the principle 'no liability without blameworthiness' in the Supreme Courts' case law the excuse of absence of all blameworthiness has been developed. It supplements the codified defenses. Absence of all blameworthiness may be due to ignorance of facts or ignorance of law.

The ignorance of facts must be reasonable. The offender must have done all he reasonably could do in order not to be ignorant. If the ignorance is due to indolence, frivolity or indifference, there is no absence of all blameworthiness.

The ignorance of law functions as a mitigation of the presumption that everyone has to know the law. The ignorance is only excused when the offender has actively sought expert advice on law by a person or agency having such an authority that he could reasonably trust the reliability of the advice, but he was misinformed. Misinformation by the police, a notary, a civil servant of a ministry may lead to excusable ignorance. Misinformation by his counsel does not lead to excusable ignorance of the offender.

## 5.12 Inchoate offences

*Attempt*

An attempt to commit a crime is punishable where the offender manifests his intention by initiating the crime (sect. 45 CC). In case of attempt the statutory principal penalty for the crime is reduced by one third. This sentence reduction has two reasons: less danger to society has materialized than by the consummation of the crime and the reduction may be an incentive for the offender not to consummate the crime.

The Code does not define where the preparation of a crime ends and the execution of a crime starts. The Supreme Courts' case law seems to follow the objective theory: an act, which in its outward appearance should be regarded as being directed to the consummation of the crime is an act initiating the crime.

There is no attempt if the crime has not been consummated by reasons only of circumstances dependent on the offenders' will (sect. 46b CC). The offenders' motives for not consummating the crime are irrelevant.

There are two reasons for the impunity of this so-called voluntary withdrawal: the offender is not as bad as he initially appeared to be and impunity may be an incentive not to consummate the crime.

*Preparation*

Preparation does not fall in the legal scope of attempt since there is no initiation of the crime. For the prevention of crimes it was felt to be unsatisfactory that the police could not arrest offenders preparing serious crimes. Recently therefor the preparation of serious crimes which carry a statutory prison sentence of not less than eight years has been criminalized (sect. 46 CC). Preparation of such a crime is punishable where the offender intentionally obtains, manufactures, imports, transits, exports or has at his disposal, objects, substances, monies or other instruments of payment, information carriers, concealed spaces of means of transport clearly intended for the joint commission of such a crime.

In the case of preparation, the statutory maximum penalty for the crime is reduced by one half since no or less danger for society has materialized.

There is no preparation where the crime has not been completed by reason only of circumstances dependent on the offenders' will.

*Complicity*

Complicity is the involvement in criminal offences as principal or as accessory before and during the fact.

Principals are those who commit a criminal offence either personally or jointly with another or who cause an innocent person to commit a criminal offence and those who, by means of gifts, promises, abuse of authority, use of violence, threat or

deception or providing the opportunity, means or information, intentionally solicit the commission of a crime (sect. 47 CC).
Accessories to crimes are those who intentionally assist during the commission of a crime and those who provide the opportunity, means or information to commit the crime (sect. 48 CC).
Accessory to infractions is not punishable. In the case of complicity as an accessory, the statutory maximum of the principal penalty is reduced by one third.

### 5.13 Corporate criminal liability

Criminal liability is not restricted to natural persons. Private or public corporate bodies can also be held liable for committing an offence (sect. 51 CC). In the case where a criminal offence has been committed by a corporation, prosecution may be instituted against the corporation and/or against the persons in the corporation who have ordered the commission of the criminal offence and against those in control of such unlawful behavior. Both the person and the corporate body may be sentenced for the offence.
A corporate body commits a criminal offence if the corporation itself or the management is in the position to control the occurrence of the criminal activities and moreover, if it turns out in the course of the events that these activities had been accepted by the corporate body.

### 5.14 Statute of limitations

Time limits can bar the prosecution of a criminal offence. The rationale for the time limits is related to the reduced societal need to punish the offender and the difficulties in gathering evidence after a long lapse of time. The more serious the offence the longer the period of limitation is.
According to sect. 70 of the Criminal Code, the statute of limitation ranges from two years for all infractions, to eighteen years for crimes which carry a statutory punishment of life sentence. The time limits are six, twelve and fifteen years for crimes which carry statutory imprisonment of less than three, less than ten and more than ten years respectively. Exceeding the time limits leads to a dismissal of the case.
The time limits for the enforcement of the sentence are one-third longer than the time limits for the prosecution.

## 5.15 Double jeopardy

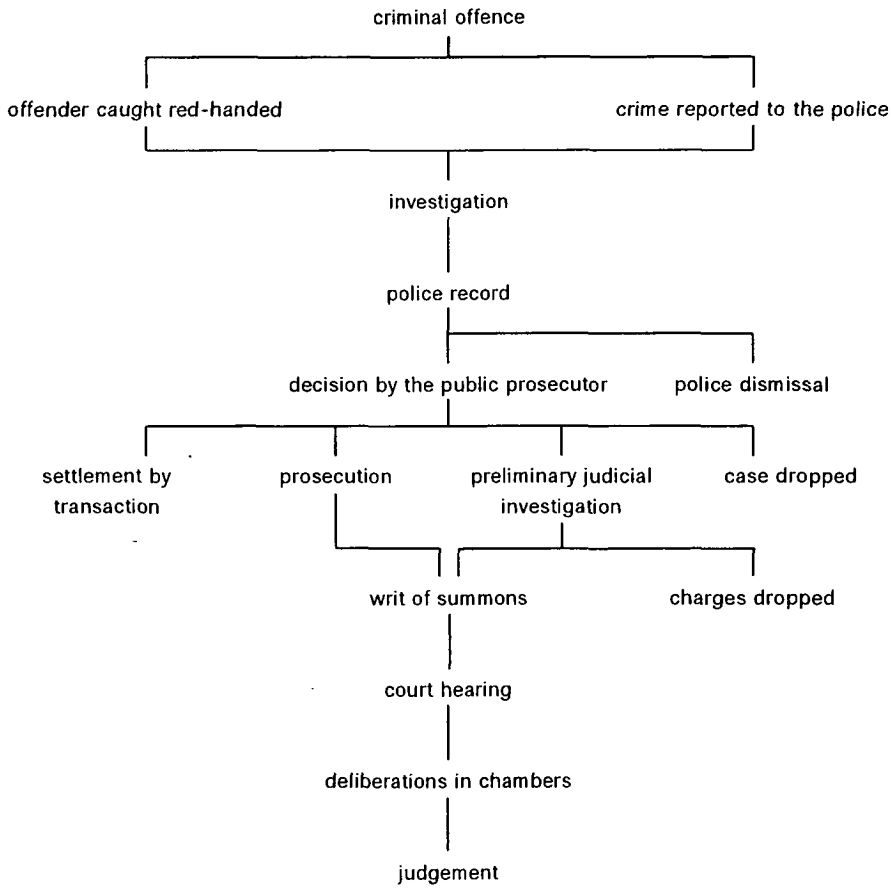
Double jeopardy or successive prosecutions for the same act are prohibited by section 68 Criminal Code, which reads: No person may be prosecuted twice for an act for which a final judgement has been rendered by a (Dutch) court.
The Code does not define what is meant by act.
According to the Supreme Courts' case law where one act constitutes more than one criminal offence each of them can be prosecuted provided the offences are different in the objective of prohibition and in the nature of the blame that can be imputed to the offender, e.g. a joy-rider who drives dangerously can be prosecuted both for the offence of joy riding and for the offence of dangerous driving.

# 6

# Issues of procedural law

## 6.1 The pre-trial phase

**Scheme 1: The criminal procedure in first instance**



## 6.2 Pre-trial investigation

A criminal procedure for a court in first instance comprises two phases: the pre-trial investigation phase and the public trial phase.
There are two kinds of pre-trial investigations:
— the investigation by the police under the direction of a public prosecutor, and
— the judicial investigation by an examining judge.
The criminal procedure is initiated with the pre-trial investigation carried out by the police as soon as the police are informed of a criminal offence. The purpose of the pre-trial investigation is to gather information on the offence and the suspect. A suspect is anyone who may reasonably be suspected of having committed the offence. The police have the right to question any person in relation to the offence, whether or not this person is a suspect. However, no one is obliged to answer questions put by the police.
The police prepare a written record of the questioning of the suspect and other persons and of other relevant findings of facts. The written records are prepared by the police under oath, and may be used as evidence by the court. The police are authorized to carry out coercive measures such as arrest, body search and search of the premises when the legal prerequisites to do so exist.

## 6.3 Police investigation

*Investigative methods*
The Code of Criminal Procedure doesn't give a systematic description of investigative measures nor give statutory rules for all investigative methods used by the police.
Some statutory rules exist concerning the interrogation of the offender by the police and concerning investigative methods of a coercive nature such as the use of DNA-tests for the identification of the offender or telephone interception. Other important investigative methods, such as the interrogation of witnesses or the use of observation and infiltration by the police, the application of technical means of investigation such as fingerprints, confrontation through the Oslo-method and the use of dogs for a search do not have a statutory basis.
The admissibility of these investigative methods is based on the Supreme Courts' case law.
Under Dutch law, before a criminal investigation may be started and investigative measures applied, there must be a reasonable suspicion that a criminal offence has been committed. In recent years the police have more and more focussed on the gathering of information about networks, groups and individuals especially in order to know what criminal activities were planned, thus before a criminal offence

was committed, the so-called pro-active policing. Pro-active policing methods did not have a statutory basis in the Code of Criminal Procedure or in any other Act. Due to the report of the Parliamentary Enquiry Committee on police investigation matters which concludes that the police by using pro-active policing methods have performed illegal investigation methods, a set of rules on investigative police methods is proposed to Parliament, which will provide a sound statutory basis for systematic police surveillance, police infiltration, pseudo purchase or provision of services by the police in this respect, systematic undercover information gathering, recording confidential communications by means of a technical device, the power to enter closed places, the use of informers and exploratory investigation.
When the police investigation is terminated, the written records are forwarded to the prosecutor for a decision on prosecution.

### 6.4 Examining judge

The examining judge plays an important role in the pre-trial phase. He or she performs two functions, namely in determining whether a suspect should remain in pre-trial detention for a period of up to ten days and in (further) investigating crime. The examining judge has powers which the police and prosecutor lack. He may order a witness to come before him and make a witness deposition. The examining judge may order the interception of telephones and the interception of mail or order a psychiatric examination of the suspect.
If the public prosecutor finds that the proper investigation of a crime requires the exercise of one of these powers, he must request the examining judge to start a judicial preliminary investigation.

*Judicial investigation*

If the police investigations cannot be finalized because specific further coercive measures needs to be taken, the public prosecutor may request the examining judge to open judicial preliminary investigations. The public prosecutor applies for a judicial investigation where there is a need for the powers of the examining judge. More intrusive measures such as the power to search premises or the power to intercept telephone calls may be used by the public prosecutor or a senior police officer in cooperation with the examining judge or after an examination by the examining judge as a check on the exercise of these powers. Only in a restricted number of cases that come to trial a judicial investigation has taken place.
During this preliminary investigation the examining judge carries out further investigations, if necessary, with the help of the police. The examining judge may issue a warrant for a search of the premises and supervises this search. He may hear a witness on oath who cannot be present at the trial or who may not be willing

to appear at trial because of fear of retaliation from the defendant. In such cases the defense counsel is notified and he may attend the hearing and put written questions.

## 6.5 Prosecutorial decisions

When the police investigation or the judicial investigation is terminated the prosecutor has to take a decision. He can decide:
— to drop the case,
— to settle the case by means of a transaction, or
— to issue a writ of summons on the offender.

*Non prosecution*

The right of prosecution rests exclusively with the public prosecutor (the so called "prosecutorial monopoly"). No prosecutorial power is granted to private persons or bodies, not even when the prosecution service abstains from prosecution.
This prosecution monopoly does not mean that the prosecution has to prosecute every crime, which is brought to its notice.
The prosecution service may decide not to prosecute in a case where prosecution would probably not lead to a conviction, because of lack of evidence or because of technicalities (technical or procedural waiver). Furthermore the prosecution service may decide not to prosecute on policy considerations.
Section 167 of the Code of Criminal Procedure expresses the basic principle of prosecution: "The public prosecutor shall decide to prosecute when prosecution seems to be necessary on the basis of the result of the investigation. Proceedings can be dropped on grounds of public interest".
In appropriate cases the prosecutor can decide to conditionally suspend prosecution. No explicit general or special conditions for a suspended non-prosecution exist, but in practice the prosecutor imposes conditions similar to the conditions attached to a suspended sentence.
Until the late 1960s the discretionary power to waive (further) prosecution has been exercised on a very restricted scale.
At the end of the sixties a remarkable change in prosecution policy took place. Research into the effects of law enforcement and the limited resources of law enforcement agencies made clear that it was in fact impossible, undesirable, and in some circumstances even counter-productive, to prosecute all investigated offences. Gradually the discretionary power not to prosecute because of policy considerations began to be exercised more widely. In order to harmonize the utilization of this discretionary power the top of the prosecution service, the Assembly of Prosecutors-General issued national prosecution guidelines. Public prosecutors are bound by

these guidelines except where special circumstances in an individual case are given. In line with these guidelines a public prosecutor can waive prosecution for reasons of public interest if for example:

— other than penal sanctions or measures (e.g. disciplinary, administrative or civil measures) are preferable or more efficacious,
— prosecution would be disproportionate, unjust or ineffective with regard to the nature of the offence (e.g. the offence caused no harm and there is no need to impose a punishment),
— prosecution would be disproportionate, unjust or ineffective with regard to the offender (e.g. very old age or good probability of re-socialization),
— prosecution would be contrary to the interest of the state (e.g. state security, peace and order), and
— prosecution would be contrary to the interest of the victim (e.g. when compensation has already been paid).

In the early eighties the proportion of unconditional waivers on policy considerations was rather high. Approximately 28% of all cleared crimes was not further prosecuted. The underlying assumption was that prosecution should not be automatic but should serve a concrete social objective. The 1985 criminal policy plan 'Society and Crime' explicitly stated that such a high proportion of waivers on policy grounds could no longer be justified. The prosecution service was therefore instructed to reduce the number of unconditional waivers by making more frequent use of conditional waivers, reprimands on transactions.
In conformity with the views expressed in the 1985 policy plan and in the 1990 policy plan 'Criminal law and criminal policy' the percentage of unconditional policy waivers dropped to almost 4% in the late nineties.
The public prosecutor is truly *dominus litis*. The prosecutor may decide to charge the suspect with a less serious offence (e.g. by disregarding aggravating circumstances) despite the existence of sufficient evidence to charge the suspect with a more serious crime. The trial judge has no control over the content of the charge.

*Transaction*

Instead of prosecution the public prosecutor may decide to settle a case by a transaction. Transaction can be considered as a form of diversion whereby the offender voluntarily pays a sum of money to the Treasury, or fulfils one or more financial conditions laid down by the prosecution service in order to avoid further criminal prosecution and a public trial.
The opportunity to settle criminal cases through a transaction has existed for a very long time. However, until 1983 this was exclusively reserved for infractions in principle punishable only with a fine.

Following the recommendations of the Financial Penalties Committee, the 1983 Financial Penalties Act opened up this opportunity for crimes as well (sect. 74 PC). The public prosecutor may use the transaction for crimes which carry a statutory prison sentence of less than six years. The right to prosecute lapses when the conditions of the transaction are met by the offender.
The following conditions may be set:

a the payment of a sum of money to the State, the amount being not less than five guilders and not more than the maximum of the statutory fine;
b renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;
c the surrender of objects subject to forfeiture or confiscation, or payment to the State of their assessed value;
d the payment in full to the State of a sum of money or transfer of objects seized to deprive the accused, in whole or in part, of the estimated gains acquired by means of or derived from the criminal offence, including the saving of costs and/or
e full or partial compensation for the damage caused by the criminal offence.

The restriction that transaction is excluded for crimes carrying a statutory prison sentence exceeding six years has a restricted impact. The overwhelming majority of crimes carry a statutory prison sentence of less than six years.
The almost unlimited power given to the prosecution service in 1983 to settle criminal cases by a transaction without the intervention of a court has been strongly criticized. The most important criticisms were that the increased transaction opportunities introduced the plea-bargaining system, represented a real breach of the theory of the separation of powers, damaged the legal protection of the accused, favored certain social groups and entrusted the prosecution service with powers which should remain reserved for the judiciary. Furthermore it was feared that now that around 90% of all crimes had been brought within the sphere of transaction, the public criminal trial, with its guaranteed rights for the accused, would change from being the rule to the exception.
Despite this criticism the introduction of the transaction was a great success. More than 30% of all crimes prosecuted by the prosecution service are settled out of court by a transaction. This is in line with the criminal policy plan '*Criminal law and criminal policy*' which formulated as its target for 1995 that one-third of all crimes prosecuted be settled by offering a transaction.
The transaction for crimes seems to be very popular both for the prosecution service and the offender. It saves the prosecution service and the offender time, energy and expenses and furthermore the offender from being stigmatized. It quite often happens that high transaction sums for environmental crimes committed by corporations are accepted in order to avoid negative publicity.

In order to minimize the risk of arbitrariness and lack of uniformity in the application of transactions the Board of Prosecutors-General has issued guidelines for the common crimes for which transaction is most frequently used, relating to the principles which need to be taken into consideration regarding transaction and prosecution.
The guidelines, however, have not been able to prevent considerable local variations both in frequency of application and the level of transaction sums, because the guidelines themself leave a wide margin of discretion for the public prosecutor, e.g. simple theft can, according to the guidelines, lead to a transaction between Dfl 100 and Dfl 750 and for simply bicycle theft the transaction sum may be between Dfl 250 to Dfl 750.
Not just public prosecutors may offer a transaction for crimes. Since 1993 the police may do so for certain categories of crimes. Shoplifting and drunken driving have been designated as offences for which the police may offer a transaction.
The maximum amount of a police transaction for crimes is Dfl 500 (sect. 74c PC).
The maximum amount of a prosecutorial transaction for crimes is Dfl one million.

*The writ of summons*

When the police have forwarded the written records to the public prosecutor or when the examining judge has closed the preliminary investigations, the prosecutor can decide to further prosecute the case provided that there is, in the opinion of the public prosecutor, sufficient evidence to issue a summons on the offender.
The summons comprises the charge and a list of witnesses to be sub-poenaed. The trial stage begins as soon as the prosecutor has issued a summons.

## 6.6 Character of the pre-trial phase

The pre-trial phase has a tempered inquisitorial character. Specific inquisitorial elements are present when such coercive measures as bodily searches, searches of the premises or telephone interception are applied.
The inquisitorial character is tempered by provisions providing the offender has the right to be assisted by a defense counsel and the right to communicate without supervision with his counsel. The suspect is furthermore informed on the progress of the investigations in the pre-trial phase unless this information would hampers the proper conduct of the investigation. In case of, for example, telephone interception the suspect is informed about it shortly before the judicial investigation is closed.

## 6.7 Arrest and detention before and pending trial

Deprivation of liberty of a person suspected of having committed a criminal offence before and pending trial can be divided into five phases:
— police arrest in order to be questioned
— police custody
— remand in custody
— remand detention
— detention pending trial.
In the first and second phase the decision on the deprivation of liberty rests with the public prosecutor, or a senior police officer if the decision of the prosecutor cannot be waited for.
In the other three phases the decision rests with the judiciary, a single judge or a full bench of the court. The latter three phases form the pre-trial detention, the first and second phase are not part of the pre-trial detention.

*Police arrest*

Police-arrest (ophouden voor verhoor, sect. 53 CCP) is possible upon discovery of any crime in progress or for crimes which carry a statutory prison sentence of four years or more.
Arrests have to be ordered by a public prosecutor or a senior police officer (*hulp-officier van justitie*).
The aim of arrest by the police is the interrogation of the suspect by a senior police officer in the interest of the investigation of a criminal offence. During the first interrogation the police officer assures himself that the right person has been arrested, that the arrest was lawful, and that continuing deprivation of liberty seems necessary. This is the so-called verification interrogation. The first interrogation is the most convenient time to comply with the obligation to inform the arrested person of the reasons for his arrest.
The arrested person has the right to be assisted by his counsel during this verification interrogation, but in practice a counsel is hardly ever present. The same applies for an interpreter.
The police arrest may last up to six hours not including the hours between midnight and nine a.m., during which the detainee can be questioned. In this interrogation the suspect has no right to assistance by a defense counsel. A defense counsel is not yet assigned to him. The client can see a counsel of his own choosing after this questioning.
The term of six hours starts at the moment when the arrested person arrives at the place of questioning. Because transport to the place of questioning may take quite some time (sometimes more than 24 hours), the deprivation of liberty can take much longer than six hours.

An additional term of six hours arrest may be ordered if measures for the identification of the suspect have to be taken, for instance fingerprints, photographs and so on.

*Police custody*

After expiration of the term for police-arrest the suspect has to be either released or taken into police custody (*inverzekeringstelling*, sect. 57 CCP). Police custody is ordered by the public prosecutor or by a senior police officer. Police-custody can only be applied in the interest of the investigation of criminal offences for which pre-trial detention is possible.

The police custody order holds good for three days. The order can be extended once for up to three days by the public prosecutor. The term within which the person in police custody should be brought before the judge (see sect. 5 subsect. 3 ECHR) may not be more than three days and fifteen hours from the moment of arrest.

After three days of police custody the arrested person has to be brought before a judge. The judge may only examine the lawfulness of police custody and not, for instance, weigh the personal interests of the suspect and the interests of the investigation.

An examination in full only takes place after six days and fifteen hours when the examining judge has to decide whether the detention has to be continued by issuing a remand in custody order.

The police custody order contains a description of the criminal offence, the reasons why the order was issued (in the interest of the investigation), and the circumstances which have resulted in the supposition of these reasons (mostly: interrogation of witnesses/confrontation/further interrogation of the suspect is necessary).

From the moment of the police custody order the suspect has the right to an assigned defense counsel who has free access to the suspect, unless this is abused to hamper the finding of the truth. The defense counsel also has access to the police files on the case.

*Remand in custody*

After the expiry of the term of police custody (six days and fifteen hours) the suspect has to be released or brought before the examining judge who can order remand in custody (*bewaring*, sect. 63 CCP) for ten days at the request of the public prosecutor. The remand in custody order can also be issued without preceding police custody. The suspect is heard by the examining judge. His counsel may be present at this interrogation. The remand in custody is the first phase of the pre-trial detention. Pre-trial detention can be ordered provided that the statutory requirements are met. The CCP distinguishes between cases in which pre-trial detention is admissible (sect. 67) and grounds on which pre-trial detention may be applied (sect. 67a).

Pre-trial detention is admissible in cases where the offender, based on facts and circumstances, is seriously suspected of having committed a crime,

— which carries a maximum sentence of not less than four years imprisonment, or
— which is specifically designated e.g. embezzlement, fraudulent misrepresentation and threat, or
— which carries imprisonment provided that the suspect does not have a fixed residence or regular place of abode in the Netherlands.

Section 67a CCP deals with the grounds on which pre-trial detention may be applied. According to this section for the application of pre-trial detention there must be a danger that the suspect will abscond or there must be a serious reason of societal safety. The same section enumerates the four reasons of societal safety. A serious reason of societal safety exist:

— if the offence carries a maximum statutory sentence of at least twelve years imprisonment and the legal order has been seriously shocked by the offence
— if there is a serious risk that the offender will commit a crime,
  - which carries a maximum statutory sentence of not less than six years of imprisonment, or
  - by which the safety of the state or the health or safety of persons may be jeopardized or a general danger to property is created
— if there is a serious suspicion that the offender has committed a property offence and will re-offend where less than five years has passed since he was sentenced to a deprivation or restriction of liberty or a community service order, or
— if it is necessary to detain the offender in order to establish the truth by methods other than through his own statement.

Remand in custody is not permitted if it is not likely that the offender will be sentenced to imprisonment. Furthermore, pre-trial detention has to end if it is no longer likely that the actual imprisonment (taking into consideration the provisions on early release) will last longer than the period of detention.

*Remand detention*

If the grounds for pre-trial detention after expiry of the term of remand in custody are still valid, the prosecutor requests the full bench of the court to order remand detention for thirty days (gevangenhouding, sect. 65 CCP). This request may be repeated twice. The requests are dealt with by the court in camera. The suspect is heard in processing these requests.

The suspect can at all times request cancellation of the remand detention and has the right to be heard about the first request. Otherwise the suspect has the right to be heard every thirty days.

*Detention pending trial*

If the suspect is still in pre-trial detention after one hundred days, the public prosecutor has to present the case to the court in order to be tried. Unless the case is ready for trial, the trial may be adjourned. In either case the remand detention order may remain valid until sixty days after the final court decision provided that the verdict in the first instance and on appeal results in a prison sentence exceeding the period spent in detention. In case of an acquittal or discharge or a prison sentence in length not exceeding the pre-trial detention, the order has to be cancelled with immediate effect.

In the majority of cases the offender is released before the full-term of pre-trial detention (hundred days) has expired. The remand detention can be suspended by imposing conditions, or cancelled ex officio at the request of the public prosecutor or the suspect.

Limiting the duration of pre-trial detention has the result that cases against detained suspects are tried by courts with priority.

*Deduction of the period of detention*

A statutory provision (sect. 27 of the Criminal Code) provides that the full term of arrest and pre-trial detention shall be deducted from the term of the imprisonment. Courts do not have any discretion in this regard.

## 6.8 The right to challenge detention

For police arrest and the first term of police custody, the CCP provides no procedure to challenge the lawfulness of the detention. If the lawfulness of these two phases of detention is doubted, one will have to try and find a solution in consultation with the police and the public prosecutor who has issued the order, or with their superior officers. If this fails, there is the possibility of initiating summary civil proceedings before the civil judge because of unlawful detention and because of the urgency of the case.

The suspect can make use of the right to request release when he is brought before the examining judge before the expiry of three days' police custody.

With regard to remand in custody it is assumed that the suspect has the right to elicit a release order from the examining judge. If this is issued, the prosecution service has fourteen days to lodge an appeal with the court. The suspect is also entitled to request the court to cancel the remand in custody order.

At the occasion of his first request the suspect has the right to be heard by the court. Should the court refuse to cancel the remand in custody order, an appeal can be lodged with the Court of Appeal.

In the fourth and fifth phases of the pre-trial detention the suspect can appeal against the court order to the Court of Appeal within three days. This means that the suspect can lodge an appeal against each decision of the court to continue the pre-trial detention, that is once every month. Furthermore the suspect has the right to ask the court to cancel the pre-trial detention order.
If the possibility of challenging the detention under criminal procedure does not, in the circumstances of the case, offer the prospect of a timely decision, the civil judge can always be asked for a decision by means of summary civil proceedings.
All in all this leads to the conclusion that Dutch law offers full habeas corpus protection.

## 6.9 The right to compensation for unlawful detention

The Dutch CCP provides for financial compensation for time spent in pre-trial detention when the criminal case ends without a sentence or with a sentence for an offence for which pre-trial detention was not admissible.
Compensation is possible for unlawful detention, but also in retrospect for unjustified lawful detention.
The compensation does not have to be of a financial nature. Unlawful as well as unjustified lawful detention can be compensated in the form of reduction of the duration of a prison sentence imposed for another criminal offence.
Unjustified lawful detention is compensated by a payment for immaterial damages of between Dfl. 100 and 150 per day of deprivation of liberty.
The decision on compensation under criminal procedures is given by the court in camera. This court should preferably be composed of the judges who also served as the trial judges.

## 6.10 Rights of the defense counsel during pre-trial stage

Defense counsel has the right to free and unmonitored access to a client who is in custody. Since such access is not allowed to delay the investigation, counsel is always partly dependent on the criminal justice authorities and on the time and facilities made available for this purpose by the police
When exercising his right to inspect the police files on the case, defense counsel is also dependent on the cooperation of the relevant authorities in order to obtain the copies in good time. The most important restriction on the provision of an effective defense is the fact that defense counsel does not have the right under statutory law or case law to be present at police interrogations.

## 6.11 The end of the pre-trial phase

The pre-trial phase ends and the trial-phase begins with the decision to prosecute the case and to summon the offender. The charge is mentioned in the summons so that the offender can prepare his defense.
When the court finds that no further questions are necessary, the public prosecutor sums up the evidence. The defendant or the defense counsel may reply to the prosecutor, and the defendant is given the last word.

## 6.12 The trial phase

A court hearing commences with the identification of the accused by the court and the reading of the indictment by the public prosecutor. The accused is reminded by the court of his right not to answer questions.
The indictment is the subject of the court session. It consists of a description of the alleged criminal offence and closely follows the statutory definition of the offence.
The court doesn't have the power to modify the charge if it deems necessary. The public prosecutor is vested with the power to do so, since he is master of the trial. This power, however, is very limited. This is due to what is called 'the tyranny of the indictment', i.e. a judge may only convict the accused on the basis of the indictment.
After the reading of the indictment the court examines the accused and the witnesses (either called by the prosecutor or by the defendant or his or her defense counsel) and the experts. Afterwards the public prosecutor and the defense counsel may ask additional questions of the accused and the witnesses. Unlike the accused the witnesses are obliged to answer the questions put by the court, the prosecutor and the defense counsel. No cross-examination, however, takes place. The examination of the accused and the witnesses by the court is usually combined with the reading by the presiding judge of their statements made to the police or the examining judge. Witnesses are examined after having taken the oath. The defendant may not be questioned under oath. He has the right to remain silent and cannot be obliged to tell the truth and nothing but the truth.
After the evidence has been taken the public prosecutor makes his closing speech (requisitoir). In his closing speech he gives a summing up of the evidence and recommends what offence the defendant is to be sentenced for and requests that the court impose a sentence as requested by the public prosecutor. However, the judge is not bound by this request. Thereafter the defense counsel addresses the court with his plea. The last word before the presiding judge close the trial is given to the accused.

After the close of the session of the court, the court goes *in camera* to deliberate the verdict and the sentence. The sentence are read in a public session of the court.
A convicted person may not be ordered to pay the costs of the criminal procedure.

## 6.13 Court decisions

The court can take four procedural decisions and four substantive decisions. As procedural decisions the court can declare the summons null and void, can declare itself not competent to try the case, can dismiss the case and finally can suspend further prosecution.
The court must declare the summons null and void when it has not been served properly or when the indictment is not properly formulated or not comprehensible.
The court must dismiss the case when the right to prosecute a case doesn't exist (anymore), e.g. due to the statute of limitations, due to a settlement of the case through a transaction, or due to the fact that a requirement for prosecution has not been met.
Under some circumstances the court must suspend further prosecution e.g. when the defendant is not fit to stand trial.
When the court decides that the summons is valid, the court is competent to try the case and the case is not to be dismissed nor the further prosecution has to be suspended, the court has to give a substantive decision.
The court has to decide whether the facts mentioned in the indictment are proven, whether the facts constitute a criminal offence, whether the accused is criminally liable and what sentence should be imposed.
The accused is to be acquitted when the essential facts, charged in the indictment, are not proven by the evidence presented.
A discharge of the accused takes place when the facts charged are proven but don't constitute a criminal offence or the offender is not liable due to a justification or exculpation defense.
A sentence may be imposed when the evidence that the accused has committed a criminal offence is beyond reasonable doubt and when the accused is liable for the offence.

## 6.14 Character of the trial phase

The trial phase has an accusatorial character. There is to a large extent an equality of arms between the public prosecutor and the defendant. Since, however, the main purpose of the trial phase is to discover the truth, a pure adversarial system is not followed. For instance, the system of cross-examination is unknown. It is mainly the judge who asks questions during the criminal trial.

## 6.15 Legal remedies against court decisions

The general legal remedy against a decision by the court of first instance is appeal. The appeal must be filed in due time, as a rule within fourteen days. Appeal involves a complete rehearing of the case. The appellate court may, when the appeal was not lodged by the prosecutor, increase the sentence only by a unanimous decision. An acquittal by a court of first instance may be changed to a conviction only by a unanimous decision of the court, unless the public prosecutor has appealed as well. Furthermore appeal in cassation may be lodged at the Supreme Court against court of appeal decisions except an acquittal.
Appeal in cassation is not a re-hearing of the case since the Supreme Court is not deciding on the facts but merely assess the proper application of law by the lower courts. Where the Supreme Court rules that substantive or procedural law has not been properly applied, the verdict of the lower court will be quashed and a lower court has to give a new decision bound by the decision of the Supreme Court concerning the proper application of law in the particular case.

## 6.16 Trial in absence of the accused

The accused has the right to be present at the court trial but he is not required to appear in court unless the court orders so, which rarely happens. A case may be tried in the absence of the accused unless he was not summoned properly. As a rule service of the summons must be given to the accused in person, or to his representative, at least ten days prior to the court session.
Prior to the 1998 Procedural law reform Act the accused lost the right to be defended by his defense counsel if he himself was not present during court session.
Since that Act an absent accused may have himself defended by his counsel when the latter is explicitly empowered by the accused to do so. In that case the trial is considered to take place in the presence of the accused.

## 6.17 Rules of evidence

An offender can be convicted only when the court through the court trial has gained the conviction from evidence defined by statute that the offender has committed the offence as indicted. The evidence may not rest upon the testimony of a single witness (*unus testis nullus testis*) and a conviction may never be based solely on the statement of the accused. A guilty plea is unknown.
The court is free in assessing the truthworthiness of the evidence and the quality of the evidence. In the verdict the court has to state the reasons for convicting the accused. The burden of proof as a rule lies with public prosecutor. The court may play, however, an active role in gathering evidence during court trial by ordering

further investigation. The presumption of innocence is a fundamental principle of the Code of Criminal Procedure.

*Statutory means of evidence*

Five means of evidence are defined by statute:

— the court's own observations during the court hearing,
— the statement of the accused in court or elsewhere provided the statement appears from a means of evidence,
— the statement of a witness in court, including hearsay testimony,
— the statement of an expert in court, and
— written (police) materials.

A statement of the accused is his statement during court trial about facts and circumstances he knows from his own knowledge. A refusal to make a statement may not lead to adverse inferences.

A statement of a witness is the information he gives in court on facts and circumstances he personally perceived and experienced. Personal opinions, guesses and conclusions are excluded as evidence. Hearsay testimony falls within the definition of a witness' statement which has as effect that a police officer can make a statement on a statement of a witness without the latter appearing in court.

Previously the criminal procedure took predominantly place on the basis of written proceedings. The adversarial rule was then at stake. Under the influence of the recent case law of the European Court of Human Rights the adversarial principle nowadays gets more emphasis by summoning more and more witnesses.

An expert statement is an opinion based on his expert knowledge concerning the subject on which his opinion is sought. As a rule this opinion is expressed in an expert witness' report which is read out at trial.

In that case the report falls under the evidence category of written materials.

The Code distinguishes five categories of written materials:

— written decisions by members of the judiciary
— reports by members of competent agencies on facts or circumstances personally perceived or experienced by them
— documents of public agencies concerning subjects related to this competence containing the communication of facts and circumstances perceived or experienced by them
— reports of experts and
— all other written materials. The latter category may only be used in relation with the content of other means of evidence.

*Rules on gathering evidence*

The rules governing the methods of acquiring evidence deal mainly with the interrogation of the accused or the witnesses and with the legal prerequisites for

acquiring technical evidence. Coercive measures can be used to collect evidence. In principle these coercive measures may only be used in cases of crimes for which pre-trial detention is allowed by law (crimes carrying a maximum statutory prison sentence of four years or more). Permission to apply coercive measures must be obtained from the examining judge.
Unlawfully obtained evidence (e.g. evidence collected during illegal searches of premises or illegal telephone interception) may have three consequences:
— the court may mitigate the sentence in proportion with the seriousness of the irregularity provided that the harm caused by the irregularity can be compensated
— the evidence may exclude
— the case may be dismissed if the irregularity by obtaining the evidence would lead to a trial that would be in conflict with the principles of a proper criminal procedure.

## 6.18 The victim

*Legal position of the victim*

The term victim does not occur in the Code of Criminal Procedure nor in any other criminal law statute. The victim has a procedural role only in the capacity of witness, informer or injured party. He has little rights in the pre-trial and trial phase. He has no right to present a criminal charge or to be heard in his capacity of victim on the charge presented by the public prosecutor. The victim does not have the right to counsel nor the right of appeal.
Due to the changing attitude the weak legal position of the victim and in line with the United Nations Declaration on Basic Principles of Justice for Victims of Crime and the Abuse of Power (1985), a number of guidelines have been issued by the prosecution service on how to treat victims. The guidelines oblige police and prosecutors to inform the victim whether the prosecution of the offender will take place and about the possibility of financial compensation from the offender. Furthermore the legal position of the victim has been substantially improved by the 1995 Criminal Injuries Compensation Act.

*Complaints by the victim against non-prosecution*

The Dutch Code of Criminal Procedure grants the right of prosecution exclusively to the prosecution service. The State thus has a full monopoly on prosecution without any restriction. The victim does not have the right to private prosecution.
Anyone who has a direct interest in the prosecution of an offender has a legal remedy against a decision of the police or the prosecutor not to proceed with a case. If the police do not proceed, the interested party may lodge a complaint with the public prosecutor, who is accountable for the police decision. If the public prosecu-

tor has decided to waive the proceedings, the interested party may lodge a written complaint with the Court of Appeal. The Court will then review the decision of the public prosecutor. The interested party has the right to be heard by the Court and may be assisted by his counsel. The Court of Appeal may order the initiation of a prosecution if it finds that the prosecutor has misused the power of discretion. However, in practice prosecution is seldom ordered by the Court of Appeal.

*Civil claims in criminal trial*

In his capacity of injured party, since the 1995 Criminal Injuries Compensation Act, the victim can join in the pre-trial or trial phase, the proceedings as injured party and can claim full financial compensation from the offender to be decided on by the criminal court in connection with criminal proceedings (sect. 51a CCP).

The claim may comprise material and immaterial damages. The heirs of a victim who died as a result of the criminal offence may join the proceedings as well. There is no statutory maximum amount that can be claimed when joining the proceedings, but the claim must be clear and not too complex to be dealt with by the criminal court.

The joiner as a rule is effected by a form in the pre-trial phase to be handed to the public prosecutor and in the trial phase to be handed to the court containing personal data of the injured party and information on what the grounds for the claim are and the content of the claim. For the proper preparation of the claim the injured party has access to the police files of the case. In claiming compensation from the offender the victim is not assisted by the State but may be assisted by a counsel or by a proxy.

The State does not assist the injured party in the effective recovery of his claim. To avoid the situation that recovery of the claim is impossible due to the unwillingness of the offender, the court can either impose a partly suspended sentence under the condition that the offender pays a compensation or can impose a compensation order. Compensation orders are enforced by the State.

*Criminal Injuries Compensation Fund*

In 1976 the Criminal Injuries Compensation Fund was established. Anyone who has been the victim of a violent criminal act which caused serious bodily injuries can claim compensation of up to Dfl 50,000 for material damages and Dfl 20,000 for immaterial damage from this Fund. A national committee decides whether the claim is to be granted. Appeal against this decision may be made to the Court of Appeal in The Hague.

The Compensation Fund pays annually over ten million Dfl to victims. The number of claims is around 3000. In around 80% of the cases the claim is approved.

*Victim Support Schemes*

Local victim support schemes, funded by the Ministry of Justice through the National Victim Support Organization, cover the country and provide help and guidance to individual victims of crime. Yearly over 1700 professionals and volunteers approach more than 100,000 victims. Two-third of them accepts the offer. Particular attention is given to victims of incest, rape and violence. A number of schemes are developed for special types of aid, such as support group of victims of robbery, victims aid for tourists and aid to victims of sexual violence. In most cases the police refer the victim to the victim support schemes.

The victim support scheme provides financial and material help, and helps the victim to overcome any psychological and emotional problems resulting from the crime. The victim is helped in avoiding further contact with the offender, and in solving practical problems (such as housing and employment). The Victim Support Schemes also provide information about the criminal case and the offender, as well as information on the technical aspects of crime prevention.

# 7

# The system of sanctions

## 7.1 Classification of penalties

The current Dutch sanctions system for adults distinguishes between penalties and measures. Penalties are aimed at punishment whereas measures are aimed at the promotion of the security and safety of persons or property or at restoring a state of affairs. A measure differs from a penalty in that it can also be imposed where there is no question of criminal responsibility, in the sense that the person cannot be blamed for having committed a crime.
Furthermore when imposing a penalty there must be proportionality between both the seriousness of the offence and the blameworthiness of the offender on the one hand and the amount of punishment on the other hand.
The Criminal Code furthermore distinguishes between principal penalties and accessory penalties, which originally only could be imposed in conjunction with a principal penalty. Since 1984 accessory penalties may be imposed as principal sentences as well.

## 7.2 Sanctions for adults

The various principal penalties are set out in order of severity in section 9 of the Criminal Code as follows:
— imprisonment (sects. 10 -14),
— detention (sects. 18-20),
— community service (sects. 22b-23), and
— a fine (sects. 23-24b).
For all offences, the maximum term is given by the Act, which defines the particular offence. This maximum term reflects the gravity of the worst possible case and is thus high for the most serious offences, e.g.: twelve years for rape, six years for domestic burglary, nine years for extortion and four years for theft.

## 7.3 Capital punishment

Capital punishment for ordinary crimes was abolished in 1870. For military crimes and war crimes capital punishment was abolished in 1983 (sect. 114 Dutch Constitution) but in practice has not been used since 1950. The Netherlands ratified Protocol no. 6 to the European Convention of Human Rights on the abolition of the death penalty.

## 7.4 Principle penalties

*Imprisonment*

The most severe penalty in the Dutch penal system is imprisonment, which can only be imposed for crimes. The most severe form is life imprisonment, which is rather seldom imposed. Only a few crimes carry life imprisonment as a statutory penalty, but the Criminal Code does not prescribe compulsory life imprisonment in any circumstances. Crimes, such as murder or manslaughter under aggravating circumstances carrying life imprisonment, also carry a fixed-term prison sentence of up to twenty years. Furthermore, since 1983 a fine may be imposed as the sanction for any crime, even those for which the Criminal Code prescribes life imprisonment.

A life sentence is deprivation of liberty for an indeterminate period. Parole or release arrangements are not applicable in the case of a life sentence. Life sentences, however, may be converted by way of pardon into a fixed-term prison sentence, for example for twenty years. After such conversion the offender may be considered for early release. As a rule, a life sentence lasts for about fifteen years.

The fixed-term prison sentence is the most frequently applied form of imprisonment. The statutory minimum is one day and the statutory maximum is fifteen years. In certain circumstances the maximum may be twenty years. Unlike the situation in other countries none of the offences carry a special statutory minimum term of imprisonment. Thus, for example for murder a minimum prison sentence of one day is theoretically possible.

Where an offender is sentenced to imprisonment for several offences committed concurrently or consecutively the court may impose a prison sentence, which may exceed by one third the maximum statutory prison sentence for the severest offence.

*Detention*

Detention is the custodial sentence for infractions. The minimum duration of detention is one day and the maximum duration is one year. In special cases, e.g. in cases of recidivism, the maximum can be increased to sixteen months. Originally intended as a *custodia honesta*, detention is deemed a lighter sentence on the sentencing scale than imprisonment, although the two hardly differ in the manner of their implementation.

*Community service order*

The development of community sentences started in the seventies with the establishment in 1974 of the Committee on alternative penal sanctions. This Committee was set up to advise the government on new sentencing options in order to reduce the number of short term prison sentences.

Resolution (76) 10 of the Committee of Ministers of the Council of Europe and positive experiences in England and Scotland suggested CSOs as a sentencing option.

In 1979, the Committee on alternative penal sanctions proposed a CSO experiment, which was initiated on February 1, 1981.

Ministerial guidelines directed that the experiments take place within the existing statutory framework. Therefor CSO could be imposed by the prosecution service as a condition to waive prosecution or by the court as a condition attached to a decision to suspend a sentence.

At the end of the experiment, statutory provisions governing the CSO for adult offenders were introduced in the Criminal Code (sects. 22b-22j) on December 1, 1987. Statutory provisions on CSO for juvenile offenders followed in September 1995 (sects. 77m-77q PC).

The CSO for adult offenders is a distinct sentence option and considered to be a restriction of a person's liberty that is less severe than the custodial sentence and more severe than a fine. A CSO may not exceed 240 hours. If less than 120 hours, the work must be completed within six months; otherwise within twelve months.

The criminal court may impose a CSO only if it would otherwise impose an unconditional prison sentence of six months or less or a part-suspended/part-unconditional prison sentence of which the unconditional part is six months or less. Community service may not be used as an alternative to a suspended prison sentence, a fine, or a fine-default detention.

The court may impose community service only when there has been a proposal from the accused that he is willing to carry out nonremunerated work of a type described in the proposal. The accused's 'compulsory consent' is a statutory requirement to avoid contravening international conventions prohibiting forced labor. The judge has to state in his sentence the prison sentence for which the community service is a substitute and specify the number of hours' work to be carried out, the period within which it must be completed, and the nature of the work.

The prosecution service is responsible for overseeing CSOs and information may be requested from individuals and organizations involved in probation work for this purpose. When the prosecution service is satisfied that the work has been carried out properly, it must notify the convicted person as soon as possible.

If the convicted person has not carried out the work properly, the prosecution service may request revocation of the CSO and imposition of the prison term mentioned in the sentence. The judge must take into account work that has been properly carried out. The prosecution service must make its revocation request within three months after the end of the completion period for the community service.

The probation service is responsible for administering CSOs and co-ordinators have been appointed for each of the nineteen jurisdictions. The co-ordinator's job is to canvass for projects, maintain a project bank, maintain contacts with the project institutions, and write final reports.
The co-ordinator decides on the nature of the work to be carried out, taking into account the offender's skills, education and vocational training.
If the work requires team effort, the co-ordinator decides whether the offender fits.
If the place or nature of work needs to be changed, the co-ordinator contacts the prosecution service, which has authority to make these changes. The convicted person is informed of the changes and may object within eight days to the sentencing court.
Community service work must benefit the community. It can be with public bodies like the government or private organizations involved in health care, the environment and the protection of nature, and social and cultural work. To discourage unfair competition with paid workers, regional review committees check that new regular workplaces are being used for community service.
No offences are statutorily excluded from punishment with CSOs. Given the boundary of the six-month prison sentence, however, community service operates mainly for mid-level crimes and is seldom ordered for more serious offences unless there are mitigating circumstances.
The number of community sentences increased rapidly from 2,000 in 1983 to over 20,000 in 1996. The target for 2000 is more than 30,000.
One of the major restrictions for the application of the community service order is the statutory request that the offender in front of the court has to consent with the community service order. Nowadays almost 13,000 short-term prison sentences are imposed on offenders who are absent during court trial. That means that those sentences are not eligible for substitution by community service orders.
The statutory CSO-rules will be reformed in such a way that the suspect can also express his consent in writing. It is expected that two-third of the short term prison sentences can be replaced by a community service order. Another restriction for the application of the CSO is that the court can only impose a CSO if it would otherwise impose a short time prison sentence. CSO in this context functions merely as a substitute to deprivation of liberty. The concept of the CSO will be changed as well in order to make it possible to impose a CSO as a sentence on its own.

*Fine*

The fine is the least severe of the principal penalties. Originally the fine was exclusively intended for infractions and minor crimes.
Since the 1983 Financial Penalties Act all offences, including ones subject to life imprisonment may be sentenced with a fine.

The 1983 Act furthermore expresses the principle that the fine should be preferred over the prison sentence (sect. 359 CCP). This section of the CCP requires the court to give special reasons whenever a custodial sentence is ordered instead of a fine.
The 1983 Act was the final part of the major reform of the fines system, which started in the mid-1970's with a view to creating better opportunities to reduce the use of imprisonment.
The law reform was prepared by the Financial Penalties Committee established in 1966. The reform of the fines system was launched in 1976 by enacting the Financial Penalties Enforcement Act. The main purpose of this Act was to improve the enforcement of fines so that fines could function better as an alternative to the short-term prison sentences. This Act introduced the installment fine and other opportunities for paying fines in installments, simplified the recovery procedures in cases of non-payment and reduced the maximum fine default detention.
The next step was taken by the 1983 Financial Penalties Act. That Act replaced the old fines system whereby every offence carried its own statutory maximum fine with a simpler and more convenient system of fine categories. The minimum fine for all offences is five Dutch guilders (roughly 2,5 US$). The maximum fine depends on the fine category into which a crime or infraction is placed.
The 1983 Act created six categories with maxima of 500 Dfl, 5,000 Dfl, 10,000 Dfl, 25,000 Dfl, 100,000 Dfl and one million Dfl (sect. 23 CC). Infractions come under the first three categories and crimes under categories II through V. Category VI fines can only be imposed upon corporate bodies and on individuals under a few special criminal laws, such as the Economic Offences Act and the Narcotic Drug Offences Act.
When the fines system was reformed in 1983, the old system of fixed sum fines was retained. Following the advice of the Financial Penalties Committee, the introduction of a day-fine-system, as known in an increasing number of European criminal law systems, was rejected on theoretical as well as practical grounds.
Section 24 Criminal Code urges the court when imposing a fine sentence to take into account the financial position of the offender in as far as this is necessary to arrive at an appropriate sentence without the offender being disproportionately affected in his income and capital. There must be a two-fold proportionality test, between the crime and the fine and between the fine and the ability to pay.

## 7.5 Fine default detention

The implementation of fines and other judicially imposed financial penalties rests entirely with the prosecution service. If the convicted person does not pay the fine, the fine may be recovered from the offender's property. If the prosecution service rejects recovery as an option, fine default detention will be enforced. The term of

the fine default detention is set by the judge when imposing the original fine. No more than one day of detention may be imposed in place of Dfl 50.
The statutory minimum duration of fine default detention is one day, and the maximum is twelve months. A fine default detainee can be released if he or she pays the fine while in prison. Due to the shortage of cell capacity a large number of fines go unpaid each year.
The extra capacity needed annually for fine default detention was recently estimated at more than 200 cells.
In order to reduce the need for prison capacity for fine default detention a more effective way of recovering of fines imposed for crimes forms part of the present sentence implementation policy. Aim of this policy is to recover 95% of the fines within a year of being imposed.
There are at present no alternatives for fine default detention. This form of detention is not subject to current debate in penal policy.

## 7.6 Other community sanctions

*Training order or combination order*

In the early nineties new community sentences have been introduced like a training order or a combination order.
A training order means that the offender is sentenced to learn specific behavioral skills or that he is confronted with the consequences for the victim of his criminal behavior. Training orders are mainly imposed on juvenile offenders and on young adult offenders from whom it is expected that they are motivated to change their behavior by attending training courses or other activities aiming to improve communicative or social abilities.
Training orders are made for shorter or longer periods ranging from five meetings up to three months or longer over 40 hours a week. Long term intensive training orders may be imposed as a separate sentence on adult offenders only.
Training orders are usually imposed in combination with a community service order or as a condition attached to a suspended sentence.
Community sentences are by far the most important sentences for juvenile offenders. In 1995 both the community service order and the training order were introduced in the new juvenile criminal law. A community sentence is now imposed in 60% of all juvenile criminal cases.

*Electronic monitoring*

Electronic monitoring is the latest new community sentence that will get a statutory basis in the near future. Electronic monitoring is considered to be a viable substitute to imprisonment or any other form of deprivation of liberty.

Electronic monitoring is applied either in the last phase of the serving of the prison sentence or in combination with a community sentence. By applying electronic monitoring in the last phase of the serving of the prison sentence the actual stay in the prison can be shortened. The combination of electronic monitoring with a community sentence can be a substitute for imprisonment of between six and twelve months.
Candidates for electronic monitoring are proposed by the probation service. The probation service is vested with supervision and control. The decision to allow persons to serve their sentence through electronic monitoring is made by the court in as far as it concerns the combination with the community sentence and is vested with the prison administration in as far as it concerns the last phase of the detention.

## 7.7 Accessory penalties

The accessory penalties are:
— deprivation of rights and disqualification from practicing professions,
— committal to a state work house,
— forfeiture and
— publication of the judgement.
The deprivation of rights concerns: the right to hold a public office, the right to serve in the army, the right to vote and to be elected, the right to serve as an official administrator and the right to practice specific profession.
The possibility of imposing accessory penalties is rather restricted to certain kinds of offences e.g. the committal to a state workhouse may only be imposed for repeated public drunkenness in order to bring some discipline in the life of such offenders.
Both the committal to a state workhouse and the publication of the judgement are only rarely imposed.
Some special codes contain specific accessory penalties such as withdrawal of one's driving license for some transgressions of the 1994 Road Traffic Act. These specific accessory penalties are more frequently imposed.

## 7.8 Measures

Measures can be imposed on offenders regardless whether they can be blamed for having committed an offence, since measures are not aimed at punishment but at the promotion of safety and security of persons or property or at restoring a state of affairs.
A range of measures are laid down in the Criminal Code.

*Withdrawal from circulation (sect. 36a)*

During a police investigation objects may be seized. Certain objects which are dangerous or whose possession is undesired may be confiscated. This concerns: objects obtained entirely or largely by means of or derived from the offence, objects in relation to which the offence was committed, objects used to commit or prepare the offence, objects used to obstruct investigation of the offence and objects manufactured or intended for committing the offence. If the uncontrolled possession of the objects in question would be in conflict with the law or contrary to the public interest, they can be withdrawn from circulation, regardless whether the offender is convicted for a criminal offence.

*Confiscation of illegally obtained profits (sect. 36e)*

Since the 1993 Criminal Code law reform (the so-called Strip-them Act) the court may impose an obligation to pay to the State Treasury an amount that equals the financial rewards obtained through the commission of criminal offences. The measure was introduced in order to improve the fight against organized criminality. Not only the profits from a crime for which the offender was sentenced may be confiscated, but also the profits from similar offences for which a fine of the fifth category may be imposed and where there is sufficient evidence that they have been committed by him. The court must assess the net value of the illegally obtained profits. In case of non-compliance with the obligation nor full recovery the court must order a default detention of six years maximum. Partial payment doesn't lead to a reduction of the default detention.

*Obligation to pay compensation (sect. 36f)*

The 1996 Compensation Order Act introduced the possibility for the court to impose an obligation upon a person who is convicted for a criminal offence to pay the State Treasury a sum of money for the benefit of the victim of the crime. The Treasury shall remit the money received to the victim without delay. In case of non-compliance with the obligation nor full recovery of the amount due the judge shall order default detention of one year maximum. This measure is introduced in order to improve the legal position of the victim in the criminal procedure.

*Psychiatric hospital order (sect. 37)*

If a defendant cannot be held responsible for the crime because of mental defect or mental illness, the court may not impose a penalty, but the court may order that the defendant be committed to a psychiatric hospital for up to one year if the person is a danger to himself, to others, to the general public or to property in general. The court shall only issue the order after submission of a reasoned, dated and signed opinion of at least two behavioral experts – being a psychiatrist – who have examined the defendant.

*Entrustment order (sect. 37a)*

If the court considers that a defendant, despite his or her mental defect or mental illness, can be deemed responsible, the court may impose a penalty in combination with this measure. An entrustment order can be imposed for crimes carrying a maximum statutory penalty of at least four years of imprisonment and if hospital care is necessary in order to protect the safety of other people, the general public or property. The hospital care is carried out in a special private or state institution were the person is treated in the name of the government, the so-called *terbeschikking-stelling* (TBS). The order lasts for two years but may be extended by one or two years. For certain violent offences a further extension is possible.

*Out-patient hospital order (sect. 38)*

If the court considers that the requirements for an entrustment order are met but hospital care is not necessary, the defendant can be treated as an out-patient. The court can combine the principal penalty with instructions relating to his conduct and with an order that the probation service offer the necessary help and support. When a custodial sentence is also imposed the entrustment order shall not be for more than one year. The instructions attached to the entrustment order may not abridge the freedom to profess religious or other beliefs or curtail constitutional freedom.

## 7.9 Sanctions for juveniles

In 1995 a major reform of juvenile criminal law took place as a reaction to critics of the juvenile criminal law adopted in 1965. The 1965 juvenile criminal law was too paternalistic and not in line anymore with the increased emancipation of the youth. Furthermore the legal position of juveniles was too weak and the juvenile criminal law was perceived to be too complex and too out dated.
The 1995 juvenile criminal law was simplified and modernized by introducing various substitutes to imprisonment and by taking into consideration the increased emancipation of adolescents.
Only a restricted number of crimes committed by juveniles is tried by juvenile courts since both the police and the prosecution service can settle juvenile cases out of court. Minor crimes such as vandalism, shoplifting and theft can be settled by the police provided that the juvenile offender takes part in a crime prevention project of not more than 20 hours.
The prosecution service can settle a case through a conditional waiver. The conditions attached to a conditional waiver are compliance with instructions issued by the probation service during a probationary period not exceeding six months, performance of a community service order of 40 hours to be completed within three months, reparation of the damage caused by the offence, attending a training

project to improve behavioral skills and finally the payment of a transaction of less than 5000 Dfl to the Treasury.
Where the crime is too serious to be settled out of court, the juvenile court may impose juvenile detention or a fine. The aim of the detention is serious correction. The pedagogical effect of the detention is mainly the result of the deterring effect of the sanction. Although the treatment of the juvenile offender is not a major point during the implementation of the detention, much attention is paid to formative activities such as education, work and sport.
The minimum term of juvenile detention is one day. The maximum term is 12 months for juvenile offenders under 16 years of age and 24 months for those over 16 years. Juvenile detention is implemented in special juvenile penitentiary institutions where offence-related treatment can take place.
For many juveniles a fine is a rather effective sanction provided that the fine is not paid by his parents. The minimum fine is 5 Dfl, the maximum is 5000 Dfl, which may be paid in installments. The total fine must be paid within two years. When neither full payment nor recovery of the amount due is possible, the court may order a fine default detention for three months maximum.
The detention or the fine may be substituted by:
— a community service order
— work contributing to the repair of the damage caused by the offence, or
— attendance at a training center.
The community service order and the reparation work order may last two hundred hours. In the case of a combination of various substitute sanctions the maximum is 240 hours.

## 7.10 Special sanctions for military personnel

Neither the Criminal Code nor any other statute provides special sanctions for civil servants or other special groups. The Military Criminal Code, after the reform on 1 January 1991, contains sanctions similar to those noted in the Criminal Code. The custodial sanctions imposed on military personnel are enforced in the military penitentiary establishment (Nieuwersluis), where the regime differs from ordinary penal establishments.

## 7.11 Measures for juveniles

Four measures may be imposed by a juvenile court:
— the committal to an institution for young persons,
— confiscation,
— deprivation of unlawfully obtained gains and
— compensation for the damage.

The latter three measures are governed by the same rules on measures applicable in adult criminal law.
The committal to an institution for young persons may only be imposed where it concerns a serious offence for which pre trial detention is allowed, where the safety of others or the general safety of persons or of property requires such a measure to be imposed and where the measure is in the interest of the most favorable future development of the offender.
The main objective of the measure, besides the protection of the community, is to provide young persons with the education and the care, which is considered necessary.
The duration of the measure is not set before hand but is rather determined by the degree to which the young person in question requires residential education. Because of that the juvenile court may only impose the measure after submission of a reasoned, dated and signed opinion by no fewer than two behavioral scientists of different disciplines. One such expert must be a psychiatrist if the juvenile suffered from mental defect or mental disease at the time of the commission of the offence.
In principal the measure runs for two years. It can be terminated by the Minister of Justice in the meantime upon consultation with the Childcare and Protection Board, but also extended by the juvenile court. Extensions can be requested for a maximum of two years upon request of the prosecution service. Extension of the term of the measure is only possible where the measure will not exceed four years due to the extension, unless it was imposed on a juvenile offender suffering from mental defect or mental disease at the time of the offence. In such case the measure may be extended for more than two years but up to a maximum of six years. Extension is only possible if the measure was imposed in case of a violent offence or a sexual offence. The security and development criteria must once again be met before extension is allowed. This means that a juvenile offender receiving such a measure at the age of 17 years can be detained until he is 23 years. A request for an extension of the measure of committal to an institution is heard by a three-judge panel of the district court.

## 7.12 The suspended sentence

Sections 14a-14k CC deal with the suspended sentence. The Dutch suspended sentence is a hybrid form of the Belgian-French *sursis* and the Anglo-Saxon probation.
A suspended sentence means the non-implementation of (a part of) an imposed sentence. Since its introduction in 1915 the rules for the suspended sentence have been radically revised a number of times. The last occasion was in 1986 when the legal scope of application of the suspended sentence was greatly expanded.

The reform was inspired by a 1983 report of the Committee on Alternative Penal Sanctions and was strongly influenced by the need to reduce the pressure on prison capacity. The reform simultaneously responded to a need, which had long been recognized in practice, to make a partial revocation of a suspended sentence possible.
Since the 1987 law reform a suspended sentence is possible for all principal sentences, with the exception of the community service order. A prison sentence up to one year, a detention sentence and a fine can all be suspended totally or in part. A prison sentence between one year and three years can be suspended only for one-third of the sentence. A prison sentence of over three years cannot be suspended. The suspended sentence can be applied to all offences and to all sentences to detention, fines and sentences of imprisonment for up to three years.

*Partly suspended sentences*

The court may impose a sentence that is suspended only in part. Since a sentence may consist of a combination of various principal penalties, a partly suspended prison sentence in combination with a community service order or a fine is possible.

*Conditions*

The suspended sentence is always subject to the general condition that the convicted person shall not commit another offence during the period of probation. The judge determines the length of the period of probation at the time of sentencing. The period of probation is at most three years, but usually two years or less.
In addition to the general condition the judge may impose one or more special conditions, such as:

— compensation for all or part of the damage caused by the offence,
— admission to an institution of nursing care for the duration of the period of probation,
— deposit of bail (an amount of money equal to the statutory fine), and
— the donation of a certain sum of money not exceeding the maximum statutory fine to the Criminal Injuries Compensation Fund or to other organizations interested in the protection of the interests of the victims of crime.

The special conditions may not restrict the freedom to practice one's religion or personal beliefs or one's civil liberties.
The suspended sentence is very widely applied. In recent years almost 13% of all sentences are suspended prison sentences.
The sharp rise in the number of suspended sentences in the 1980's must primarily be ascribed to the experiment with community service orders. Until its statutory introduction as a principle penalty in 1989, community service was usually imposed as a special condition attached to a suspended sentence.

*Control over compliance with conditions*

The effectiveness and credibility of the suspended sentence depends very much upon the control over the compliance with the conditions attached to the suspended sentence. Formally the prosecution service had to exercise control over the compliance but in practice the probation service kept the prosecution service and the court informed about the progress of the suspended sentence through compulsory progress reports.

Compulsory probation supervision was abolished in 1973 as a result of pressure from the probation service, which increasingly had come to feel that this task conflicted with its proper social work role. With the abolition of the supervision by the probation service the judiciary's confidence in the effectiveness of the special conditions plummeted and gradually less special behavioral conditions were attached to the suspended sentence. The decline was further assisted by criticism, influenced by the human rights movement, that the special conditions were of a patronizing nature and were highly invasive of privacy.

*Revocation*

Non-compliance with the conditions attached to the suspended sentence may lead to a revocation by the court of the suspended sentence on request of the public prosecutor. The court may decide to partially revoke the suspended sentence or to extend the probation period or to add or change the condition attached to the suspended sentence.

When the court considers revoking a suspended sentence or part of it not exceeding six months it may instead order the performance of a community service (sect. 1 4g CC).

Approximately 10% of all suspended sentences are revoked.

# 8

# Sentencing

## 8.1 Statutory framework

The Dutch judiciary is vested with the widest discretionary power when sentencing. The very few statutory rules that guide the court in this process are general and do not limit the court in choices of the type and severity of the sanctions in individual cases.
The statutory framework of sanctions is set very widely. The statutory minimum term of imprisonment is one day and is the same for all crimes, regardless of the generic seriousness of the offence.
Maximum terms of imprisonment are specified and reflect the gravity of the worst possible case. Few crimes are subject to life imprisonment, but instead of life-imprisonment a fixed term prison sentence up to twenty years or a fine can be imposed.

*Aggravating circumstances*

The Criminal Code provides a rather restricted set of rules for aggravating circumstances. Three circumstances may result in a more severe sentence: recidivism, concurrent offences and the committal of an offence in the capacity of civil servant. In case of aggravating circumstances the statutory maximum sentence may be increased by one-third.
The Code, furthermore, has specified special aggravating circumstances for a number of criminal offences, which may result in a more severe sentence. This is the case with offences, which are qualified by their consequences, (e.g.: assault resulting in the death of the injured person).

*Mitigating circumstances*

The Criminal Code contains one mitigating circumstance, i.e. tender age. Tender age results in the application of juvenile criminal law with a much lighter sanction system.
Apart from this general mitigating circumstance the Code contains special mitigating circumstances which are related to certain offences.

*Concurrent sentences*

Concurrent prison sentences cannot be imposed. When a suspect has to stand trial for concurrent offences or for multiple offences, the court can not impose a prison sentence which is simultaneous and cumulative. In that case the court can impose a

joint sentence, the maximum term of which may be one-third higher than the highest statutory maximum prison sentence for one of those criminal offences. Fines may be imposed for any of the concurrent offences.
There is a limited possibility of combining various principal sentences. A prison sentence, if totally or partly suspended, may be combined with a fine.

## 8.2 Rules on reasoning

The choice of sanctions lies with the court, but is subject to procedural requirements concerning the reasoning of the sentence:

- Section 359 (5) CCP requires that the verdict states the special reasons, which determine the sentence. The judge often will confine himself to a standard phrase, which is limited to the statement that the imposed sentence meets the seriousness of the offence, the circumstances in which the criminal offence has been committed and the personality of the offender. It is generally known that this motivation, required by art. 359, (5) CCP, is pre-printed on the sentence form or flows easily from the word processor when devising the verdict.
- Section 359 (6) CCP furthermore requires that in a verdict which results in the deprivation of liberty, the special reasons are to be stated which have led to the choice of a custodial sentence, and also that the circumstances are stated which were considered in the assessment of the length of the sentence. The choice of a suspended sentence doesn't need further reasoning.
- This requirement was incorporated in the CCP through the 1983 Financial Penalties Act.
- Section 359 (7) CCP requires a statement of reasons when the court imposes a more severe sentence than the prosecution service has requested in the closing speech.
- Finally, section 359 (8) CCP requires reasons when the court rejects the defendant's offer to perform community service.

Dutch procedural criminal law provides for a two-step procedure in sentencing of adults (sect. 359 (5) and 359 (6) CCP).
The first requires a decision on the amount of the punishment that is proportionate to the offender's criminal responsibility and the seriousness of the offence.
The second step requires a decision on whether punishment should be imposed as a fine, a suspended sentence or determinate sentence of imprisonment.
In this decision it is not the individual criminal responsibility or seriousness of the offence but consideration on special or general prevention which plays a decisive role.

## 8.3 Aims of sentencing

The aims of sentencing are retribution, special or general deterrence, reformation, and protection of society and reparation. The court is free to choose the aim it thinks appropriate in each individual case. The chosen aim can often be deduced from the kind of sentence and the length of the sentence. Very often the court opts for a combination of sentencing aims, but there are also lots of examples where one aim is emphasized, e.g. HR (= Supreme Court) 26 August 1960, NJ (= Dutch case law) 1960, 566: retribution "... that measures are not, unlike sentences, also beneficial to retribution of the criminal offence and are only aimed at the protection of public order and improvement of the offender..."; HR 9 December 1986, NJ 1987, 540: general prevention "... that foreign criminals, like the defendant, should be deterred from providing for themselves by committing offences in this country"; HR 12 November 1985, NJ 1986, 327: protection of society against the defendant, "... In the imposition of a prison sentence, the reason that the Court wanted to protect society maximally by doing so, is not impermissible"; HR 15 July 1985, NJ 1986, 184: special prevention "...With a view to a proper enforcement of norms, the Court holds the opinion that no other sentence but deprivation of freedom shall be imposed".

The question which arises here is to what extent does the blameworthiness of the offender put a further limit on the severity of the sentence and to what extent should the imposed sentence be in proportion to the degree of criminal responsibility. The principle of "no criminal liability without blameworthiness" is part of Dutch criminal law. This means that a defendant by reason of insanity, cannot be punished and he will be discharged. But if he is a danger to himself or to others or to the general safety of persons or goods, the court must order that the defendant be admitted to a mental hospital through an entrustment order.

However, this principle does not result in the consequence that the sentence is fully determined by this responsibility nor that a sentence which is disproportionate to the degree of responsibility is inappropriate. In fact the sentence is not only determined by the proportion of responsibility, but also by other factors such as protection of society against recurrence in connection with the danger of the offender, the seriousness of the offence committed, the shock a serious offence has brought about in legal order, and the general and preventive effect which emanates from such a sentence (HR 15 July 1985, NJ 1986, 184). In case law the Supreme Court has repeatedly accepted a sentence in which a measure (e.g. an entrustment order) imposed because of diminished responsibility was combined with a very long prison sentence. Despite diminished responsibility the court can pass a long-term prison sentence, because it feels the need to keep the offender outside society for a long time, in order to protect society (HR 6 December 1977, NJ 1979, 181 and HR 12 November 1985, NJ 1986, 327).

Various personal or isolated factors may be reasons to adjust the sentence upwards or downwards. An upward adjustment may be justified by the criminal past of the defendant, or by the negative attitude of the defendant during the examination in court, i.e. a defendant who consistently denies having committed the crime, or a defendant tries to evade a sentence by making several false statements, by the motives that compelled him to commit the offence, for instance jealousy and hate, by the circumstance that the defendant did not want to cooperate in a psychiatric evaluation, or by the fact that the defendant fails to understand that his behavior was wrong.
A downward adjustment may be indicated by a serious delay between the time of committing the crime and the trial, by voluntarily offering compensation for damages inflicted, by expression of regret by the defendant, by the lack of previous convictions or by positive probation prospects.

## 8.4 Judicial review of sentencing

A sentence by a court in first instance can be reviewed by an appellate court. An appeal can be lodged by the defendant or the prosecutor. On appeal the court has a full discretion to determine a new sentence.
As a rule appeal pays. Recent research showed that in almost half of the cases the appeal court changed the prison sentence imposed by the court in first instance into a suspended sentence or even into a fine, though this is rare.
Sentence reduction by the Court of Appeal is often a reward for good conduct during the time elapsed between the verdict in first instance and the court session on appeal.
Supervision of sentencing is exercised by the Supreme Court as well, but the review is restricted to the question of whether the sentence is sufficiently reasoned, according to the statutory requirements of section 359 CCP.
The Supreme Court as a rule accepts as sufficiently reasoned the standard formula that the sentence is proportionate to the seriousness of the crime, the circumstances in which it was committed and with the personal circumstances of the suspect.
The Supreme Court does not accept the standard formula when:

— there is an obvious discrepancy between the offence committed and the imposed sentence, e.g. the seizure of a car worth Dfl 40,000 for a criminal offence which carries a fine not exceeding Dfl 10,000 (HR 13 June 1989, NJ 1990, 138),
— on appeal the sentence is augmented considerably without further reasoning, which is the case when a suspended prison sentence imposed in first instance is replaced by a determinate sentence (HR 2 April 1985, NJ 1985, 875), or

— the judge did not respond to an explicit mitigation as to the sentence at the trial, in which the defendant pointed out a factor for reduction of the sentence in an ardent and persuasive way (HR 1 November 1988, NJ 1989, 351).

## 8.5 Disparity in sentencing

The absence of mandatory rules for sentencing may contribute to a mild penal climate but may also result in great disparity in sentencing.
Disparity is one of the most serious problems in sentencing in the Netherlands. The Court of Appeal or the Supreme Court can, as we have seen, undo extreme unjust sentences. But neither appellate courts nor the Supreme Court can ever realize full equality in sentencing by lower courts. Equality in sentencing has been of major concern over the last decades.
Various proposals have been discussed to improve the equality in sentencing without restricting too much the judges' discretionary power to individualize the sentence.
Those proposals ranged from the establishment of a special Sentencing Court, or a data bank on sentences, to sentencing checklists or drawing up sentencing guidelines for courts but none of those proposals led to a viable solution to the problem of disparity in sentencing.
For certain groups of offences there is less disparity in sentencing. This is not a coincidence, but is connected to the fact that for these offences the prosecution service has issued directives on what sentence is to be requested at trial in the closing speech. This holds good for drunken driving, social security fraud, tax fraud, drug crimes, etc. Those directives have a harmonizing effect. It appears in practice that the court considers the sentence requested by the prosecutor in his closing speech as a guideline for sentencing.
The directives have been issued by the Board of the Prosecutors General and are in line with the sentencing policy of the individual courts.
An individual member of the prosecution service is in principle bound by these directives. This obligation stems from the hierarchical structure of the prosecution service, in which someone lower in the hierarchy is committed to instructions from his superior. This commitment is expressed in the law (sect. 5 Judicial Organization Act, and sect. 140 CCP).
Unlike the members of the prosecution service the court is not bound by these directives. Nor is it obliged to state the reasons for a deviation from the directives to the disadvantage of the offender (HR 10 March 1992 NJ 1992, 593). In daily practice the directives prove to be a beacon in sentencing policy.
Although since the 70's these types of sentencing directives for prosecutors have been issued for a large variety of crimes, they did not have the desired effect. This was due to the fact that the directives allowed a large margin between the highest

and the lowest sentence to be requested, without making clear when the highest or the lowest sentence wasappropriate.
There was also a lack of consistency in the directives. The question of whether a weapon was used is very important in the directive on bodily harm, but the use of a weapon does not play a role in the directive on sentencing for the use of violence.
Another reason why the sentencing directives were not an effective instrument against disparity in sentencing was that the prosecutorial directives on sentencing left room to the public prosecutors in individual cases, without further reasoning, to deviate from these directives. So it happened that in one jurisdiction for bicycle-theft a fine of Dfl 300 was requested by the public prosecutor and in another jurisdiction a fine of Dfl 1,250.

## 8.6 Prosecutorial sentencing guidelines

Within the prosecution service recently a project for the development of national guidelines for sentencing was started. In this project 35 new guidelines are formulated which ought to lead to equality in sentencing for the majority of crimes.
The structure of the prosecutorial sentencing guidelines is very clear. For each crime a number of sentencing points is set, e.g. bicycle-theft 10 points; burglary 60 points; motorcar-theft 20 points; shop-lifting 4 points; destruction 6 points; bodily harm 7 points; threat 8 points; insult 10 points; open or overt use of violent 15 points; import or export of hard drugs 30 points; burglary in a factory 42 points.
Due to special circumstances the number of points can be higher or lower, e.g. the use of weapons or the existence of injury to the victim lead to extra points. An attempt to commit a crime leads to a reduction of points. Recidivism means that half again of the points are added, multiple recidivism doubles the points.
Finally the points are converted into a sentence to be requested by the public prosecutor.
Not all the points count fully for the sentence. A conversion-method has been elaborated. Up to 180 points, every sentencing point counts. Between 181 to 540 points each point counts as half a point and above 541 points each point counts as a quarter of a point.
Every point leads to a fine of Dfl 50 or to one day of imprisonment. Below 30 points the public prosecutor can avoid a public trial and use the transaction modality, or he can ask for a fine during the court-session. For more than 40 points there will be an indictment and the public prosecutor will request a prison sentence, or in appropriate cases, a community service order.
An individual public prosecutor is allowed to deviate from these guidelines, but he has to give an explicit reason for doing so. The advantage of this system is that a check can take place for the 19 regional prosecution services. Where one of the

prosecution services deviates widely from the national policy a discussion must take place between the head of the regional prosecution service and the individual prosecutor.
The expectation is that uniform requests by the prosecution on the basis of these guidelines for sentencing will lead to more uniform sentences by courts.

# 9

# The prison system

## 9.1 Prison policy

The Minister of Justice is ultimately responsible for the development of prison policy. Regularly a prison memorandum or prison policy plan is issued. The most recent memorandum is called 'Werkzame detentie', which has a double meaning, although not being double Dutch. It means both effective incapacitation and laborious or industrious detention.
The main reason for issuing this new prison memorandum and developing a new prison policy is that the prison population has changed considerably over the last decade. There are many more groups of prisoners that cause problems in the penitentiary institutions: an increasing number of prisoners sentenced to very long prison sentences, aggressive prisoners and prisoners with a high escape-risk, psychotic and drug addicted prisoners etc.
There is also an increasing number of non-native prisoners who will be expelled after their release. The number of nationalities, foreign languages and religions of prisoners is growing annually.
Starting point of the present prison policy is that a standard regime for all prisoners exists in which productive labor for 26 hours a week is a central element. The standard regime offers each prisoner a number of statutorily guaranteed activities, such as open-air visits, visits by family and friends, recreation and sport.
The purpose of the standard regime is twofold:
— it leads to a more adequate implementation of the time spent in prison; boredom and idleness make room for a meaningful time-investment and
— it contributes to the integration of released prisoners in the society. Daily work to earn a living can have a beneficial effect on somebody's existence. Getting used to structuring the day around work and imparting to work discipline are conditions to reach this effect.

By far the greatest majority of prisoners will be subjected to the standard regime. A relatively small group will qualify for special treatment which is more specifically directed towards promoting their integration into society after their release.
As far as the security prisons are concerned, there will be special facilities for:
— drug addicts who want to break out of their drug-related criminal life style;
— prisoners with psychiatric disorders who require close supervision, and
— prisoners who want to improve their opportunities in society by means of education, occupational courses and work training programs.

## 9.2 The Penitentiary Principles Act

The main legislation on the enforcement of prison sentences is the 1998 Penitentiary Principles Act and the attached Penitentiary Rules. The guiding principle of the Penitentiary Act is found in section 2 which reads as follows: "While the nature of imprisonment is maintained, it shall also be implemented in order to prepare the prisoners for their return to free society".
The Penitentiary Principles Act, furthermore, covers the principles governing the regulation of the different types of penal institutions. These different types are the remand houses mainly for the implementation of pre-trial detention orders and for the implementation of certain prison sentences or other kinds of deprivation of liberty and the prisons for the implementation of prison sentences at large.
The Penitentiary Principles Act also covers the principles behind the classification of prisons, the level of association, the selection of prisoners, the use of control on and violence against prisoners, the contact with the outside world, social, spiritual and medical care, prison work, recreation, discipline and the complaint procedure for prisoners.
The Penitentiary Rules work out the principles laid down in the Penitentiary Principles Act in more detail. For example, sections 48 and 49 of the Act make provision for education and recreation. The Act requires prison governors to organize educational and recreational activities for the prisoners outside their working hours. Sections 76 to 87 of the Penitentiary Rules indicate what activities could be employed for educational and recreational purposes. The Penitentiary Rules detail the type of education to be followed, the use of the prison library, the use of books and magazines of either the prisoner himself or the public library, the reading of newspapers, the putting on of performances, films, and lectures of a general educational nature, the watching of television and listening to the radio for personal development and relaxation.
The 1997 Principles on the Implementation of Entrustment Orders Act contains the rules for the implementation of the so-called *Terbeschikkingstelling* (TBS) in forensic psychiatric institutions for offenders or prisoners suffering from serious psychiatric disturbances.

## 9.3 Types of prisons

Prior to the introduction of the 1998 Penitentiary Principles Act a number of statutory criteria had been developed for the classification of prisons. The PPA doesn't recognize age and length of the sentence as criteria for differentiation anymore. The differentiation based on gender is still in use. Men and women are detained separately but common activities are possible.

A new differentiation criterion is the level of security. Prisons are divided into very restricted, restricted, normal, extended and extra high security prisons.
There are at present forty penitentiary establishments for adults, many of which have one or more remand houses and one or more types of. There are seven penal establishments for female prisoners. Dutch penitentiary establishments are rather small. The largest has a capacity of almost four hundred cells. The total prison capacity for adults is around 13,000.
Many prisoners are so-called self reporters. Those are convicted persons who are not serving their sentence directly following on remand detention or another form of custody. They are not deprived of their liberty directly after a prison sentence has been imposed on them but, after a period of time, they are summoned to report to a particular prison to serve their prison sentences. It is assumed from the fact that they themselves report to the prison that they accept the sentence and will not try to escape. They therefore present a minimal security risk and can be kept in a very restricted security prison.

*Extra-high-security units*

After a number of spectacular escapes in 1991, the system of extra high security units was introduced for prisoners who present a high escape risk and who were labeled as extremely dangerous.
In four prisons these units of twelve cells each were established. The weak point of the extra high security units was that facilities for exercise, sport and visits were not located in the units but in other parts of the prisons. Several extreme dangerous prisoners attempted to escape using extreme violence and taking hostages.
A decision was made to build two fully-fledged EHSU's. All the facilities are inside the walls of the unit. Each unit comprises twenty four cells. In fact a unit is a prison within a prison.
Given the limited capacity, placement in an extra high security unit takes place only after a thorough assessment of the risks. Prisoners who present an extreme high escape risk and whose escape would be an unacceptable risk for the society in terms of risk of recidivism for serious violent crimes or in terms of considerable societal unrest may be placed in a EHSU.
Detention in an extra high security unit is for a period of six months but can be extended by six months provided that the escape risks still exist.
A prisoner can challenge a decision to place him in an EHSU or to renew his placement.
The regime in the extra high security unit is very restricted. No contact is allowed with prisoners of other units. Regular body-checks and special cell-control take place. Visits by family and friends take place in a room separated by a glass wall.

Visitors are bodily checked prior to the visit. Prisoners are checked prior and after the visit. All talks with visitors are recorded.
At least twice a week a half hour sport is allowed and at least three times recreational activities.
The Council of Europe's prevention of torture committee has argued that despite the good material conditions, the overall quality of life of the EHSU prisoners left a great deal to be desired.

## 9.4 The juvenile prison system

There are seven state penitentiary establishments for juveniles, six for male juveniles and one for both male and female juveniles for the implementation of juvenile detention. There are ten private penitentiary establishments which makes a selection and differentiation possible for example of juvenile sex offenders. Two establishments are extended security prisons for juvenile prisoners with an escape-risk. The aim of juvenile detention is deterrence, although during the implementation of the detention attention is paid to formative activities like education, work and sport.

## 9.5 Selection of prisoners

The system of specialized penal institutions for adults and juveniles means that prisoners have to be selected for the different types of prison. Selection is done by the Central selection and placement office at the Hague and by the regional penitentiary consultants. Using the selection criteria, they decide in which prison a convicted person must serve his or her sentence. If during the course of the sentence it becomes clear that a prisoner does not fit well in the selected prison, he can be transferred to another prison. In practice, one of the most important reasons for transfer is that the convicted person cannot be kept with other inmates in a particular prison.
A prisoner has the right to lodge a complaint against his committal to a certain prison or his transfer to another prison. The complaint is dealt with by the penitentiary consultant.

## 9.6 Level of association in prisons

A distinction is made in Dutch penal establishments between complete freedom of association and limited association. Under the regime of complete freedom of association, prisoners can move around inside the prison fairly freely except at night. Under limited association, prisoners are confined to their cells except for periods of communal or group activities. In the case of complete association,

communal activities are the rule and confinement to cell an exception; in the case of limited association it is the other way round. Thus for example in the prison for those deemed unfit to mix with other prisoners, association is restricted to work, outdoor exercise periods, church services and, in special cases, educational and recreational activities. The level of association can therefore vary from being let out of the cell only for work, exercise, church and recreation to staying out of the cell all day long. Whatever the level of association, night-time is always spent alone in the cell.

*One prisoner per cell only*

The Dutch prison system operates a principle whereby no more than one prisoner may occupy each cell. By force of circumstances the one prisoner per cell-rule since 1993 has been restricted. Prisoners for fine default and those who are put in detention due to an expel-procedure, may be accommodated in a common room. Furthermore, in emergency situations pre-trial detainees and prisoners in remand houses may be accommodated in common quarters as well.
The average size of the cell is 10 $m^2$ and each cell contains a toilet and washstand. The cell, furthermore, contains a bed, a chair, a table, a wardrobe and a shelf. Prisoners may have at their own expense a TV and video in their cells as well as a personal computer, books and a bird.

## 9.7 Prison capacity

On 1 January 1997 the total prison capacity in penitentiary establishments was 12,579 cells for adults, 1,413 cells for juveniles and 873 places for the implementation of entrustment orders in psychiatric clinics. The actual occupation rate is 96,8%. There is no prison overcrowding, but a large number of sentenced persons are placed on waiting lists for the enforcement of their sentence due to a lack of prison capacity. Despite an extensive building program the estimated shortage of prison capacity by 2002 will, nevertheless, be more than 1,100 cells.

## 9.8 Prisoners' complaint procedure

Since the 1976 Legal Status of Prisoners Act came into being prisoners have the right to lodge a complaint against decisions taken by a prison governor. This right is now regulated in sections 60-73 PPA. The complaint is put before a special committee, the so-called complaints committee, which forms part of the Prison Supervisory Board attached to every prison. Against decisions of this committee an appeal can be made by the prison director to the appeal committee of the National Council for the Application of Criminal Law.

Complaints can be made concerning:
— disciplinary punishment imposed upon the prisoner,
— refusal to forward letters sent to him or to post letters written by him, or refusal to allow visits, and
— any other measure imposed by the prison governor which represents a departure from the prisoner's rights as laid down in the prison statute for that penal establishment.

In the written complaint procedure the decision of the governor must be mentioned and the complaint must be motivated. Within four weeks a decision on the complaint has to be taken. The president of the complaint committee can postpone the implementation of the governors' decision. Where the complaint committee annuls the governors' decision, but the decision was already implemented, financial compensation to the prisoner is possible.

## 9.9 Prison regime

*Prison work*

Under section 47 of the Penitentiary Principles Act a detainee has the right to participate in prison labor. The prison governor ensures the availability of prison labor provided that this labor is not in conflict with the nature of the detention.
Convicted prisoners are obliged to properly perform the prison labor ordered, either within or outside the prison establishment.
Working hours are to be laid down in the prison statute in conformity with good practice outside the prison.
The Minister of Justice enacts rules concerning the wages for prison labor. The prison governor is responsible of the assessment of wages and their payment.
The obligation on convicted prisoners to perform work is not forced labor (sect. 3, subsect. 4 sub a European Convention on Human Rights).
Unconvicted prisoners cannot be obliged to work. If they are willing to participate in prison labor, they are to be treated in the same way as convicted prisoners.
Unwillingness to work is made unattractive. Those inmates who are obliged to work but refuse to do so are generally disciplined with confinement in a cell for punishment or separation in a cell. Other disciplinary punishments, such as denial of receiving visits or denial of leave, may be imposed as well.
Those inmates who are not obliged to work and are unwilling to participate in prison labor have to stay in their cell during working hours.
Not participating in prison labor also can mean no money to buy tobacco or other canteen-goods, such as extra sandwich-filling, or to rent a TV or to pay for telephone cards or stamps. So, by refusing to work every prisoner further diminishes the quality of his stay in prison.

*Contacts with the outside world*

In principle each prisoner has the right to send letters by post at his own expense and to receive letters. The prison governor may check the contents of the envelopes for contraband, the letter itself may be examined as well. Prisoners are informed that this examination may happen. The prison governor can withhold letters if necessary for the order or safety of the penitentiary establishment, or in order to prevent a criminal offence or to protect the victim of a crime. Each prisoner has the unrestricted right to send letters to members of the Royal Family or members of Parliament, the Minister of Justice, judicial authorities, the National Ombudsman, the National Council for the Application of Criminal Law and some other persons and bodies listed in section 37 PPA.

Each prisoner has the right to receive visitors for at least one hour per week. The prison governor can decide to refuse certain visitors or can restrict the number of visitors if necessary for the order and safety of the penitentiary establishment, or in order to prevent a criminal offence and to protect the victim of the crime.

The prison governor may set certain conditions such as submission to body searches or supervision, including the recording ofconversations.

Persons or bodies listed in section 37 PPA have an unrestricted right to visit inmates.

Each prisoner has the right to make telephone-calls for at least ten minutes per week at his own expense.

The telephone-calls may be refused if necessary for the order and safety, and so on. To persons or bodies listed in section 37 PPA unrestricted telephone-calls may be made.

## 9.10 Medical care

Physicians employed by the penitentiary establishments have to provide medical care to the inmates. On a regular basis a physician is available for medical questions. The physician may examine an inmate in order to assess his ability to take part in prison labor, sport or other activities.

The prison governor is responsible for the provision of medicaments on prescription, the treatment of prisoners as prescribed by the physician and the transfer to a hospital if prescribed by the physician.

*Aids in prison*

A serious problem is HIV infected prisoners, since a considerable part of the Dutch prison population comes from groups with an increased risk of HIV-infection. Exact data on the prevalence of HIV in Dutch prisons are not known, since there is no compulsory testing for HIV. On the basis of conversations or external symptoms or indications the physician may be informed on whether the detainee belongs to the group of high risk HIV-infection.

Recently a circular on the prevention policy of HIV-infection in prisons has been issued.
As to its key features, this policy does not deviate from the Aids policy in free society. That policy is based on two pillars: information and prevention. The policy is expressed by measures that aim at informing the prisoners and the prison staff on the way in which transmission takes place, and by a call to take preventive measures to reduce the risk of infection. This information serves to provide guards and prisoners with insight into the nature of the Aids problem, the ways in which infection may take place, and the nature of high-risk behavior. The transfer of information serves two goals: taking away needless feelings of anxiety on the one hand, and alerting everyone when necessary on the other hand.
Characteristic for the Aids policy is that it is set up in such a way that it is assumed that every detainee is potentially seropositive.
Part of the policy to prevent the spread of HIV is the supply of methadone (for drug addicted offenders) and condoms. The exchange of clean syringes is under discussion.

*Drugs in prison*

In spite of numerous measures taken in prison to prevent drugs being brought in, it is generally known that drugs in Dutch prisons are available on a large scale. Mostly these are soft drugs like hashish or marihuana, but the heavy drugs, such as heroin and cocaine, are also present.
In a number of prisons there are drug-free prison wings that function autonomously, for inmates who want to get rid of their addiction or who are afraid of becoming addicts during their imprisonment. Placement in a drug-free wing where the treatment is both of a medical and psycho-social nature, depends inter alia on the acceptance of certain conditions, such as regular random and compulsory urine tests.
Protection against drugs cannot be offered outside the drug-free wings. Having drugs is of course forbidden, and being caught in possession or use of drugs results in the application of sanctions. On the basis of the Penitentiary Rules, the prison governor may – for the benefit of order, security or the smooth operation of the penitentiary institution – require a prisoner to hand over urine for a test on the presence of drugs. A positive result or refusal leads to disciplinary sanctions.

## 9.11 Disciplinary sanctions

Disciplinary sanctions can be imposed by the prison governor when the behavior of the inmate is in conflict with good order, security and discipline (e.g. the possession of marihuana or alcohol after his return from furlough, an attempt to abscond). Before a sanction can be imposed the inmate must be heard.

Disciplinary sanctions are:
— solitary confinement of two weeks maximum,
— refusal of visits for four weeks maximum, if the behavior was related to the visit,
— isolation in the inmate's own cell for two weeks maximum, and
— refusal, withdrawal or restriction of furlough a fine of two weeks wages for prison labor.

The implementation of disciplinary sanctions can be suspended with a probation period of three months.
The inmate can lodge a complaint with the prison complaints committee against any disciplinary sanction imposed.
Safety measures can be imposed by the prison governor as well. Whereas disciplinary sanctions serve to correct the inmate's behavior, safety measures can be applied when the order and safety of the penitentiary establishment or the safety or wellbeing of the prisoner is at stake.
Safety measures are the exclusion of a prisoner of regime activities or isolation in an isolation cell. Contact with the outside world can be restricted or excluded, except contact with wardens and officials.

## 9.12 Rules for furlough

Recently new rules for prison leaves have been adopted. Four sets of rules exist: the general leave rules, the regime related leave rules, the rules on the suspension of (further) implementation of the prison sentence and finally the rules on occasional prison leaves.

*General leave rules*

The furlough regulations for long-term prisoners are laid down in the 1988 General Leave Rules. According to these rules leave is granted on an individual basis. A number of objective criteria have to be met in order for leave to be granted:
— the sentence must be final,
— the remaining sentence must be at least three months,
— one third of the sentence must have been served,
— the remaining sentence may not exceed one year, and
— the date for early release must have been fixed.

There are a number of subjective contra-indications which apply for all prison leave decisions. Leave must serve to prepare the prisoner for release. This criterion is almost always met by definition, except where there are contra-indications. This is the case when:
— a risk of absconding, re-offending, breach of the peace or public commotion can be expected,

— there is a well-founded suspicion that leave will be used to smuggle in contraband goods, or will lead to drug use or alcohol abuse,
— the convicted person is unable to keep to agreements,
— there is no acceptable leave address, or
— a risk of an unwanted confrontation with the victim of the crime can be demonstrated.

The maximum number of leaves according to the General Leave Rules is six, an average of once every two months. Leave is granted for up to sixty hours, including travelling time. The application of these general leave rules means that, during the last year of their sentence, prisoners are allowed sixty hours leave every two months. The decision to grant a leave is taken by the Minister of Justice or the prison governor on his behalf.

Foreign nationals who will be deported expelled or extradited at the end of their sentence and prisoners in a extra high security unit or in an extended security prison are not allowed leave.

*Regime related leave rules*

The rules for regime related leaves are as follows:

— all prisoners in open prisons are, in principle, entitled to weekly weekend leave;
— those serving sentences in half open prisons are entitled to a 52 hours leave every four weeks and 76 hours if the weekend is a public or Christian holiday.

*Special leave rules*

Rules also exist on suspension of the implementation of the prison sentence in very special situations; visits to family members who are seriously ill or deceased, to funerals or visits in connection with the birth of a child, may under these rules be allowed.

The rules on occasional prison leaves are related to pressing personal circumstances such as serious illness or death of a relative, the birth of a child and for medical psychiatric or psychological reasons as well as for the participation in exams or for study and vocational training.

## 9.13 Non compliance with leave conditions

Failure to keep the conditions of leave, for example by returning too late or under the influence of alcohol, may be dealt with in a number of ways. If the prisoner is in an open prison, a breach of conditions usually results in transfer to a closed institution. Alternatively, weekend leave may be reduced or completely withdrawn. If a prisoner fails to return from a normal leave this may result in a recommendation against a future leave. In addition it may be treated as a violation of prison order and discipline and be punished accordingly.

## 9.14 Absconding

Absconding from prison does not constitute a criminal offence unless criminal offences such as the kidnapping of warders or the use of violence are committed while absconding. Absconding may lead to a postponement or refusal of early release. In recent years annually less than twenty (long-term) prisoners absconded mainly with the help from outside prison. Special extra high security prisons a prison in the prison – are established for inmates with a high escape risk.

## 9.15 Significant minorities in prison

Dutch prisons contain two significant minority categories of prisoners: non-natives and female prisoners.
About 80 nationalities are represented in the Dutch prisons, ranging from citizens of the Cape Verde Islands, to Australians and Bolivians. The largest group are prisoners born in Suriname, Morocco and Turkey. Colombians, British and Germans are present in significant numbers as well. Non-natives account for half of the entire prison population. Prisoners of a foreign nationality account for about one third of the total prison population.
Female prisoners, of whom more than 40% are also foreigners and mainly drug-couriers, form a second minority category. Although the number of female prisoners has multiplied four-fold over the last decade, the absolute number is still small (430 cells in 1998). The estimated need for prison capacity for female offenders was 650 in 1998. New prison capacity for female offenders is under construction, but prison capacity will not keep pace with the need for capacity.
Due to the restricted number of penitentiary establishments where female prisoners can serve their sentences, the possibility of a differentiated enforcement is more limited than for male prisoners. In the 1998 Penitentiary Principles Act the strict separation of implementation of prison sentences imposed on male and female offenders was abolished.

## 9.16 European Convention on Transfer of Prisoners

The Netherlands is a contracting party to the 1983 European Convention on the Transfer of Sentenced Persons. The number of prisoners sentenced by a court abroad and transferred to the Netherlands to serve their prison sentence is still rather small. A very small number of offenders sentenced to imprisonment by a Dutch court have been transferred to their home country to serve their sentences.

# 10

# Early release, pardon and after-care of prisoners

## 10.1 From conditional release to early release

Conditional release provisions were incorporated in the Criminal Code as early as in 1886. At that time conditional release was intended as a gesture of leniency for good conduct, to be applied only in exceptional cases and only to prisoners who had served rather long sentences. This concept of conditional release was expressed in the legal prerequisites for conditional release, and the granting of release lay within the discretion of the prison administration.
In 1915 the regulations on release were changed considerably. Conditional release became a means of improving the rehabilitation of the offender into the free society. The objective of the conditional release was to improve the offender's future conduct by means of supervision by the probation service and by attaching conditions to the release.
Following the 1915 reform, prisoners were eligible for conditional release after having served two-thirds of their sentence and at least nine months. The period of parole lasted a minimum of one year. The release decision was taken by the administration (the Prison and Probation Department of the Ministry of Justice) at the request of the local prison board.
The prosecution service was given the power to ensure compliance with the conditions. In addition to the mandatory general condition, the administration could attach special conditions to the release decision.
The general condition was that the released prisoner will not commit further offences during the probation period and he will not behave badly otherwise.
Special conditions were related to the conduct of the released prisoner but were not further specified. In practice the special condition mostly used was that the released person should accept special supervision by a probation officer.
The prosecution service was vested with the right to control the compliance with the conditions and the right to require revocation of the release.
A breach of conditions had to be reported by the supervising probation officer.

*Decline of conditional release*

In the sixties and seventies the importance of the conditional release as a rehabilitative instrument decreased. This was partly a result of the decrease in the number of long prison sentences, which meant that the number of prisoners eligible for

conditional release (1950: ± 800; 1970: ± 340) declined as well. Far more important, however, was the fact that the professionalisation of the probation work and the adoption of new probation work methods led to a tension between the probation work philosophy and the statutory tasks for the probation service in particular concerning the post-release supervision.
The essence of this tension was that in the relation between a probation officer and a client there is no room for any authoritarianism nor for any compulsory supervision which, however, formed basic parts of the statutory probation tasks.
One consequence of this probation work philosophy was that reporting on breaches of conditions did not fit in the probation officer's duty, as a helping agent, so since the early seventies such reporting was officially abolished in the Netherlands.
As conditional release was no longer seen as a bonus for good behavior in prison, nor as an instrument of rehabilitation it became increasingly difficult for the Prison and Probation Administration to refuse to grant parole to an eligible prisoner. As a result the release percentages went up to more than 90% in 1973.
Now in practice release was granted in most cases and only refused in very specific cases, a need was felt to create the possibility for a prisoner to appeal to a court when his request for release was turned down. Since 1976 prisoners eligible for release could lodge an appeal with the special penitentiary division of the Arnhem Court of Appeal against a decision to reject, suspend or revoke conditional release. The courts' case law was very critical towards the Prison and Probation Administration's release policy and due to this case law the percentage of parole refusals dropped from 11% in 1975 to 1% by 1986.

*The conditional release law reform committee*

Gradually the conditional release changed from being a favor to almost an automatic right. Against this background in 1980 a Committee was set up to advise the Minister of Justice as to whether conditional release should be retained and if so whether it would be advisable to articulate in the penal code that eligible prisoners have the right to be paroled.
The Committee did not support the idea of an automatic release. Although automatic release would save costs since the release procedure was time consuming and very bureaucratic, and although automatic release would save prisoners from feeling uncertain, it also has considerable drawbacks. With automatic release there is a risk that courts will take the release into account when deciding on the length of the sentence; automatic release would mean that dangerous prisoners would be released as well; with automatic release there is no longer any incentive for good contact between the prisoner and the wardens, and finally, automatic release would constitute a need for remission to be deserved for good conduct.

The conclusion of the Committee was that the conditional release regulations should be reformed. The criminal code should not express the grounds on which conditional release would be granted but the grounds on which it should be refused. The Committee advocated retaining the possibility of attaching special conditions in order to provide the conditionally released prisoner with the possibility of continuing with his probation contacts.
The government, however, preferred a system which could reduce the pressure on the prison system, get rid of red-tape and save a great deal of money and time by introducing a system of automatic early release.

## 10.2 Present early release provisions

The new release legislation (sects. 15-15d CC) came into force on January 1st 1987. The essence of the release rules is that:

— prisoners serving a sentence up to a maximum of one year must be released after having served six months plus one third of the remaining term and
— prisoners serving a sentence of more than one year must be released after having served two-thirds.

Early release may be postponed or refused when:

— the prisoner because of mental disturbance is serving his sentence in a mental hospital and the continuation of his treatment is deemed necessary, or
— the prisoner is sentenced for an offence for which the statutory punishment is an imprisonment of four years or more, provided that the offence was committed during the serving of the sentence which could be eligible for release, or
— the prisoner has been guilty of very grave misconduct (according to the case law of the penitentiary division of the Court of Appeal in Arnhem this means: being suspected of a criminal offence for which pre-trial detention would be allowed) after the commencement of the serving of the sentence, or
— the prisoner, after the commencement of the serving of the sentence, has removed himself from execution or attempted to do so.

Unlike the former conditional release, the power to refuse or postpone early release rests not with the Prison and Probation Administration, but with the penitentiary division of the Court of Appeal in Arnhem. The penitentiary division decides whether the release should be postponed or refused on the request of the public prosecutor attached to the court, which had imposed the prison sentence, which is eligible for early release.
The decision is taken in a public trial at which the prisoner, assisted by his counsel, is heard. If the early release is postponed or refused, the penitentiary division sets the date of release.

## 10.3 Pardon

The new Pardon Act, which came into force on 1 January 1988, empowers the Queen to grant pardon on a request addressed to the Queen by the sentenced person or by the prosecution service.
Under section 122 of the Constitution and the provisions in the Pardon Act, pardon may be granted for all prison sentences and for fines as well as for certain measures imposed by Dutch courts. Pardon furthermore may be granted for all sentences imposed by foreign courts but implemented in the Netherlands, provided that the foreign sentence is converted into a Dutch sentence or the prisoner is transferred to the Netherlands on the basis of a treaty.
There are two statutory grounds to grant pardon. The first is that the court when sentencing did not – or could not – take account of a circumstance which if the court have been aware of it, would have led to a different sentence or to no sentence at all. The second ground for pardon is that the (continuation of the) implementation of a sentence in all reasonableness cannot serve any purpose for which the implementation was intended.
The prosecution service and the court, which imposed the sentence, are to be consulted before the pardon may be granted. Pardon may involve a complete or partial remission of the sentence, the suspension of the implementation of the sentence or the conversion of the sentence into a less serious one, such as a community service order. A pardon decision can be made conditional. The conditions of a conditional pardon are similar to the conditions of a suspended sentence. The probation service can be ordered to support and assist the conditionally pardoned offender.
In 1998 the number of requests for pardon was around 5,900. Pardon has been refused in around 3,400 cases

## 10.4 After-care of released prisoners

The after-care of released prisoners is a task of the probation service. In practice, however, due to recent budgetary cuts, the probation service is not very active in this field. The policy now is to "wait and see". However, when a released prisoner asks for help on his or her own initiative, the probation service attempts to provide all kind of material help such as assistance in providing housing, employment, counseling services etc. in order to improve the resettlement of the released prisoner. Volunteers play an important role in the after-care projects.
Apart from the probation service there exists a number of specialized social agencies, such as the regional employment services and local social services, the task of which it is to assist the general public with housing, employment and settling debts.

# 11

# Crime and sentencing patterns

## 11.1 Crime patterns

Since 1970, with an exception for 1989, the numbers of annually recorded crimes have increased. Until 1984 the annual increase was more than 10%, for the later years it was 2%. In 1995 and 1996 the number of recorded crimes decreased respectively by 3 and 6%. Between 1970 and 1996 the recorded crimes increased from 266.000 to 1.3 million in 1994 and decreased to 1.2 million in 1996 (table 1). For the whole period there has been an annual increase of 6%.
When taking into account the increase of the population, the number of crimes per 100,000 (12-79 years) in the period 1970 to 1996 almost quadrupled (table 2). 1994 was a top-year: 10,350 registered crimes per 100,000 inhabitants.
In 1970 40% of all registered crimes were cleared by the police. In absolute figures the number of cleared cases increased until 1984, but in later years the average clearance rate dropped to 17,4% in 1996. In 1996 almost 12% of all registered property-crimes was cleared. Three quarter of all criminality consisted of property-crimes.

**Table 1: Registered crimes x 1000**

| | |
|---|---|
| 1970 | 265,7 |
| 1975 | 453,2 |
| 1980 | 705,7 |
| 1985 | 1,093,7 |
| 1990 | 1,150,2 |
| 1995 | 1,222,9 |
| 1996 | 1,183,2 |

**Table 2: Registered crimes per 100.000 inhabitants**

| | |
|---|---|
| 1970 | 2,673 |
| 1975 | 4,246 |
| 1980 | 6,229 |
| 1985 | 9,168 |
| 1990 | 9,357 |
| 1995 | 9,651 |
| 1996 | 9,315 |

There are four main categories of crimes which form nowadays 98% of all registered crimes:
— violent crimes like murder, homicide, rape, threat, assault and violent theft
— property-crimes like fraud, embezzlement and theft
— destruction (including crimes against public order) and
— traffic crimes like drunken driving and hit and run-cases.

*Violent crimes* have as a common characteristic the intentional use of violence which leads to an intrusion of the physical integrity of somebody. Between 1970 and 1995 the number of violent crimes quadrupled (1970: 120; 1995: 510 violent crimes per 100.000 inhabitants). While the number of crimes in 1995 and 1996 decreased, the number of violent crimes increased 6% in 1996. The number of crimes against life and rape remained rather stable, but assault, threat and violent theft increased. In 1995 45% of violent crimes consisted of assault and 23% of violent theft. Both percentages have been rather stable over the years.

Between 1970 and 1995 the number of *property crimes* per 100,000 inhabitants increased from 1,287 to 7,136. In 1995 and 1996 the number of property crimes, mainly bicycle theft and theft of cars or theft out of cars, decreased annually by 8%. Because three-quarter of all criminality consists of property crimes, the decrease of the overall criminality in 1995 and 1996 has been caused by the decrease of property crimes. The number of burglaries had its top in 1984 and 1994 but is now at the same level as in 1986. In 1995 the number of burglaries was twelve times as high as in 1970. The clearance-rate decreased of 11% in 1995.

There has been a gradual increase of *crimes of destruction* and *crimes against the public order* from 100 per 100,000 inhabitants in 1970 to 1,127 per 100,000 inhabitants in 1995. The average annual increase over the last years was 4%. The clearance-rate dropped 13% in 1995. Destruction is by far (144,000 cases) the most important crime of this category.

Between 1970 and 1995 the number of *traffic crimes* per 100,000 inhabitants increased from 254 to 704. In 1995 traffic crimes increased by 10%. In 1980, after the introduction of a new section on drunken driving in the Traffic Act, 50% of all traffic crimes consisted of drunken driving. Since 1992 it is 30%. Since drunken driving as a rule is cleared due to a specific control by the police, this decrease may be the result of less control by the police. In 1996 62% of all traffic crimes were hit and run cases (1986: 30%).

The number of *drug crimes* increased between 1970 and 1996 from 442 to 6,600 (of which 1,300 soft drugs cases in 1996 and 5,300 hard drugs cases in 1996.

Large scale criminality is by far a problem of larger cities. The average of registered crimes for the whole of the Netherlands in 1996 was 9,315 per 100,000 inhabitants. In small communities (< 20,000 inhabitants) this average was 5,600; in larger towns

**Table 3: Sentencing patterns 1970-1995**

| | 1970 | 1975 | 1980 | 1985 | 1986 | 1987 | 1988 |
|---|---|---|---|---|---|---|---|
| < 1 month | 7.757 | 8.796 | 9.093 | 6.724 | 6.141 | 5.875 | 5.943 |
| > 1< 3 months | 2.668 | 3.418 | 3.566 | 3.558 | 3.052 | 3.429 | 3.556 |
| > 3< 6 months | 2.142 | 2.422 | 2.308 | 2.680 | 2.434 | 2.577 | 2.785 |
| < 1 year | 1.878 | 1.720 | 2.176 | 1.821 | 1.754 | 1.934 | 2.216 |
| > 1 < 3 years | 184 | 338 | 485 | 1.281 | 1.210 | 1.409 | 1.419 |
| > 3 < 5 years | 27 | 71 | 117 | - | - | - | - |
| > 5 years | 8 | 42 | 58 | - | - | - | - |
| > 5 < 6 years | - | - | - | 216 | 250 | 322 | 402 |
| > 6 years | - | - | - | 64 | 59 | 103 | 105 |
| | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 |
| < 1 month | 5.833 | 6.797 | 6.299 | 6.511 | 6.114 | 7.469 | 8.065 |
| > 1 < 3 months | 3.534 | 4.558 | 4.680 | 4.821 | 5.526 | 6.585 | 6.946 |
| > 3 < 6 months | 2.904 | 3.279 | 3.630 | 3.974 | 4.032 | 4.650 | 4.789 |
| < 1 year | 2.163 | 2.394 | 2.441 | 2.286 | 2.300 | 2.968 | 2.984 |
| > 1 < 3 years | 1.399 | 1.507 | 1.674 | 1.641 | 1.978 | 2.347 | 2.438 |
| > 3 < 6 years | 368 | 438 | 389 | 388 | 406 | 610 | 648 |
| > 6 years | 120 | 174 | 130 | 143 | 164 | 172 | 188 |

(> 250,000 inhabitants) it was 16,000. In larger towns the number of violent crimes is four to five times higher than in smaller towns.
The number of juvenile suspects (12-17 year) increased from 42,000 in 1980 to 51,000 in 1996. The number of adult suspects from 152,000 to 179,300. Per 100,000 juveniles this was in 1980 2,843 and in 1996 4,665. Per 100,000 adults this figure was 1,704 in 1980 and 1,758 in 1996.
The number of female juvenile suspects increased from 4,100 in 1980 to 6,800 in 1996 and the number of female adult suspects from 15,600 in 1980 to 24,800 in 1996. Per 100,000 juveniles there were 561 female suspects in 1980 and 1,275 in 1996. Per 100,000 adults there were 313 female suspects in 1980 and 426 in 1996.
Although the majority of suspects are males, the number of female suspects is increasing more rapidly.

## 11.2 Sentencing patterns

On average the present prison population serves considerable longer sentences than twenty five years ago (table 3).
In particular in the last fifteen years there has been a constant need to extend the prison capacity. Between 1980 and 1995 the total prison capacity increased from almost 3900 cells to almost twelve thousand (table 4).

**Table 4: Prison capacity**

| penitentiary establishments | for adults | for juveniles | for the implementation of entrustment orders in psychiatric clinics (TBS) |
|---|---|---|---|
| 1985 | 4,827 | 667 | 402 |
| 1986 | 4,829 | 695 | 349 |
| 1987 | 5,170 | 707 | 358 |
| 1988 | 5,822 | 669 | 464 |
| 1989 | 6,240 | 691 | 470 |
| 1990 | 7,021 | 722 | 489 |
| 1991 | 7,650 | 802 | 528 |
| 1992 | 7,773 | 832 | 551 |
| 1993 | 8,151 | 846 | 578 |
| 1994 | 9,439 | 888 | 627 |
| 1995 | 10,249 | 1,045 | 650 |
| 1996 | 12,127 | 1,214 | 728 |
| 1997 | 12,579 | 1,413 | 873 |

Recent governments have decided to further extend the total prison capacity to more than 16,000 in the year 2000.
The present policy is to slow down this increase in prison capacity by extending the possibilities for the judiciary to impose sentences which substitute prison sentences. Furthermore, a new policy for crime prevention will be implemented as will be the newly elaborated prosecutorial sentencing guidelines.

The permanent pressure on the prison capacity is caused by a variety of factors like the raising crime rate, the increasing seriousness of the criminality, the more primitive penal climate a.s.o.
Recently a research has been carried out on two aspects, which have a serious impact in the prison capacity:
— the average length of a prison sentence and
— the number of prison sentences.
In this research figures of 1995 are compared with those of 1985.
Since 1980 there has been a constant increase in the number of detention years imposed by courts (table 5) (1980: 3,000; 1985: 5,900; 1995: 10,900).
In the beginning this increase was mainly caused by the increase of the average length of the prison sentence. Until 1985 this was due to more severe sentences for drug crimes. After 1985 the average prison sentence increased for other crimes as well, in particular for sexual crimes (1985: 250 days; 1995: 501 days) violent crimes (1985: 280 days; 1995: 471 days) and crimes against the public order (1985: 78; 1995: 161).

**Table 5: Number of detention years**

| prison sentences | 1985 | 1995 |
|---|---|---|
| < 2 wks | 133 | 149 |
| > 2 wks < 1 mth | 285 | 352 |
| > 1 mth < 3 mths | 881 | 1,362 |
| > 3 mths < 6 mths | 1,111 | 1,615 |
| > 6 mths < 9 mths | 538 | 357 |
| > 9 mths < 1 yr | 439 | 947 |
| > 1 yr < 2 yrs | 1,018 | 2,361 |
| > 2 yrs < 4 yrs | 673 | 2,002 |
| > 4 yrs | 692 | 1,796 |

**Table 6: Percentage of registered crimes for which an unsuspended prison sentence has been imposed**

| | 1985 | 1995 |
|---|---|---|
| drugcrimes | 22 | 34 |
| violent crimes | 16 | 21 |
| property crimes | 13 | 18 |
| sexual crimes | 18 | 17 |
| fire arms crimes | 12 | 10 |
| crimes against the public order | 6 | 6 |
| Traffic Act crimes | 8 | 3 |
| economic crimes | 0 | 1 |

**Table 7: Number of prison sentences**

| | unsuspended prison sentence | partly suspended prison sentence | suspended prison sentence |
|---|---|---|---|
| 1970 | 8.407 | 4.547 | 10.151 |
| 1975 | 10.099 | 4.698 | 13.935 |
| 1980 | 9.261 | 6.108 | 16.509 |
| 1985 | 10.361 | 5.390 | 22.191 |
| 1990 | 10.051 | 4.582 | 19.875 |
| 1995 | 20.529 | 4.823 | 17.291 |

The average prison sentence for drug crimes and property crimes decreased (drug crimes 1985: 401 days; 1995: 375 days; property crimes 1985: 94 days; 1995: 91 days). In general the average prison sentence increased from 133 days in 1985 to 197 days in 1995.

From 1990 the number of unsuspended and partly suspended prison sentences increased from 15,000 to almost 25,000 in 1995 (tables 6 and 7). The total number of prison sentences (both suspended and not suspended) over the period 1985-1995

remained rather stable; the number of not suspended prison sentences doubled. In 1990 the proportion of unsuspended prison sentences to suspended prison sentences was 1:1,5; in 1995 this ratio was 1:0,8. In particular for drug crimes, violent crimes and property crimes less suspended prison sentences were imposed. Together with the increase in the number of unsuspended prison sentences, the increase of the average prison sentence slowed down. Around 1990 there was a break. Until 1990 the increase in average sentence length was accountable for 82% of the increase of the total number of detention years and the increase in the number of sentences for 18%. For the period between 1990 and 1995 these figures are respectively 44 and 56 percent.

What are the reasons why much more and much longer unsuspended prison sentences have been imposed in 1995 than in 1985?
There are at least five possible causes:
— criminal law reforms by which the statutory maximum sentences were increased;
— an increased willingness of the public to report crimes;
— changes in the detection and investigation policy and the expansion of the police force;
— changes in seriousness, amount and kind of criminality; and
— a more punitive sentencing policy.

Interviews with representatives of the police, the prosecution service, the judiciary and the bar revealed that two causes prevailed:
— criminality, in particular violent criminality, became more serious.
Violent criminality leads to more severe sentences. Half of the increase of the number of detention years has been caused by more severe sentences for violent crimes.
— judges and prosecutors became more punitive.

Over the past ten years the penal climate has become more punitive, in the beginning slightly, in the most recent years much more so. Courts are less likely to suspend prison sentences.

**Annex 1**

# Demographic issues

The Netherlands and the Netherlands Antilles in the Caribbean form the Kingdom of the Netherlands. The present boundaries of the country were established after the Netherlands was separated from Belgium in 1830. The Netherlands consists of twelve provinces, two of which carry the name Holland: Northern Holland and Southern Holland. The word Holland has become popular as a *pars pro toto* for the entire country.

The Netherlands is surrounded by the North Sea on the north and the west, the Federal Republic of Germany on the east and Belgium on the south. The language spoken in the Netherlands is Dutch, which belongs to the Germanic language group. The court language is either Dutch or Frisian. The latter is mainly spoken in the upper region of the Netherlands.

The total population of the Netherlands is around 15,6 million (7,697 million males and 7,870 million females).

| 1997 | male* | female* |
|---|---|---|
| 0-12 years | 1189 | 1135 |
| 12-18 years | 559 | 453 |
| > 18 years | 5949 | 6282 |

* thousands

*Allochthonous population*

There is a large number of aliens who live in the Netherlands without permission, the so-called "illegals". The exact number is by definition unknown and always subject to political dispute.

The most important countries of origin among the allochtonous population are Turkey (271,000) and Morocco (227,000).

Some 200,000 non-natives come from other European Union states such as Germany (54,000), the United Kingdom (39,000), Belgium (24,000), Spain (17,000) and Italy (17,000).

*Major urbanized areas*

Netherlands has an average of 459 inhabitants per square kilometre. In the western part of the Netherlands, an area called Randstad, the population density is high (960 per $km^2$). The density in the northern provinces is 190 per $km^2$ and in the Eastern and Southern provinces 440 per $km^2$.

In the Randstad, which forms 17% of the total land area, 42% of the total population lives in urbanized areas and large cities such as Amsterdam (the capital), Rotterdam (largest harbor) and The Hague (the governmental center).

*Unemployment rate*

Almost 6,3 percent of the working population (15-64 years) is unemployed. The unemployment rate is rather high among the non-natives. More than 100,000 people have been unemployed for longer than three years. Unlike many other countries women are not employed to the same extent as men. 6,8 Million people are economically active, 4,1 million of them male and 2,7 female.

## Annex 2

# Statistical data

**Law enforcement in figures**

| | registered crimes | cleared up | settled bij prosecution service | tried by criminal court | *x 1000* |
|---|---|---|---|---|---|
| 1970 | 265,7 | 109,2 | 52,2 | 50,3 | |
| 1971 | 307,7 | 115,7 | 60,4 | 51,1 | |
| 1972 | 348,2 | 125,8 | 62,2 | 52,2 | |
| 1973 | 388,0 | 133,7 | 62,5 | 52,6 | |
| 1974 | 425,5 | 137,9 | 63,0 | 54,2 | |
| 1975 | 453,2 | 149,6 | 60,7 | 59,1 | |
| 1976 | 525,6 | 173,2 | 66,8 | 65,5 | |
| 1977 | 550,7 | 177,8 | 77,8 | 70,0 | |
| 1978 | 570,0 | 186,6 | 81,0 | 75,5 | |
| 1979 | 622,4 | 199,6 | 85,2 | 76,8 | |
| 1980 | 705,7 | 210,1 | 97,5 | 82,8 | |
| 1981 | 812,1 | 234,6 | 109,3 | 83,8 | |
| 1982 | 922,9 | 247,9 | 114,7 | 89,9 | |
| 1983 | 986,3 | 257,7 | 133,3 | 85,9 | |
| 1984 | 1083,4 | 272,5 | 135,1 | 82,3 | |
| 1985 | 1093,7 | 262,8 | 137,0 | 83,8 | |
| 1986 | 1097,1 | 261,1 | 136,2 | 83,5 | |
| 1987 | 1129,5 | 266,6 | 135,1 | 83,2 | |
| 1988 | 1146,2 | 266,1 | 138,8 | 85,5 | |
| 1989 | 1159,6 | 266,5 | 142,5 | 85,6 | |
| 1990 | 1150,2 | 255,6 | 141,3 | 83,7 | |
| 1991 | 1181,8 | 238,1 | - | - | |
| 1992 | 1268,5 | 242,5 | - | - | |
| 1993 | 1272,3 | 237,7 | 161,8 | 85,0 | |
| 1994 | 1305,3 | 236,3 | 149,8 | 99,3 | |
| 1995 | 1230,7 | 210,6 | 145,1 | 102,3 | |

**Prosecutorial discretion**

| Year | non prosecution | of which due to: - technicalities | - policy considerations | *x 1000* |
|---|---|---|---|---|
| 1970 | 37,6 | | | |
| 1971 | 43,1 | | | |
| 1972 | 44,8 | | | |
| 1973 | 46,0 | | | |
| 1974 | 45,7 | | | |
| 1975 | 45,5 | | | |
| 1976 | 49,5 | | | |
| 1977 | 58,0 | | | |
| 1978 | 60,9 | | | |
| 1979 | 65,5 | | | |
| 1980 | 72,3 | 22,8 | 49,5 | |
| 1981 | 78,7 | 24,6 | 54,1 | |
| 1982 | 80,3 | 25,6 | 54,7 | |
| 1983 | 82,1 | 26,4 | 55,7 | |
| 1984 | 74,1 | 25,3 | 48,8 | |
| 1985 | 74,8 | 26,5 | 48,3 | |
| 1986 | 68,0 | 26,4 | 41,6 | |
| 1987 | 66,7 | 29,2 | 37,5 | |
| 1988 | 67,5 | 31,0 | 36,5 | |
| 1989 | 69,0 | 31,5 | 37,5 | |
| 1990 | 70,5 | 32,5 | 38,0 | |
| 1991 | - | - | - | |
| 1992 | - | - | - | |
| 1993 | 58,1 | 28,1 | 30,0 | |
| 1994 | 58,3 | 30,4 | 27,9 | |
| 1995 | 55,4 | 30,8 | 24,6 | |

**Average prison occupation**

| Year | | | | | |
|---|---|---|---|---|---|
| 1970 | 2,644 | 1980 | 3,224 | 1988 | 5,341 |
| 1971 | 2,830 | 1981 | 3,486 | 1989 | 6,027 |
| 1972 | 2,774 | 1982 | 3,699 | 1990 | 6,481 |
| 1973 | 2,529 | 1983 | 3,971 | 1991 | 7,047 |
| 1974 | - | 1984 | 4,418 | 1992 | 7,317 |
| 1975 | 2,526 | 1985 | 4,608 | 1993 | 7,582 |
| 1976 | 2,866 | 1986 | 4,599 | 1994 | 8,285 |
| 1977 | 3,039 | 1987 | 4,883 | 1995 | 9,540 |
| 1987 | - | | | 1996 | 10,690 |

# Sinds 1994 verschenen rapporten in de reeks Onderzoek en beleid

**1994**

129 Heenzendingen
*M.M. Kommer*

130 Appels en peren; een onderzoek naar de recidive van dienstverleners en kortgestraften
*E.C. Spaans*

131 Delinquentie, sociale controle en 'life events'; eerste resultaten van een longitudinaal onderzoek
*C.J.C. Rutenfrans, G.J. Terlouw*

132 Rechtsverzorging en wetenschap; een plaatsbepaling van het WODC bij het afscheid van J. Junger-Tas
*M.M.J. Aalberts, J.C.J. Boutellier, H.G. van de Bunt (red.)*

133 Het openbaar ministerie en grote fraudezaken
*J.M. Nelen, M. Boone, M.D. van Goudoever-Herbschleb*

134 De civiele procedure bij de kantonrechter; evaluatie van een vernieuwing
*A. Klijn, C. Cozijn, G. Paulides*

135 Toelating en opvang van ama's
*R.F.A. van den Bedem, H.A.G. de Valk, S.O. Tan*

136 Een partner van verre: de cijfers
*J.J. Schoorl, M. van de Klundert, R.F.A. van den Bedem, J.C. van den Brink*

137 Stoppen of verplaatsen? Een literatuuronderzoek over gelegenheidsbeperkende preventie en verplaatsing van criminaliteit
*R.B.P. Hesseling*

138 Criminaliteit en strafrechtelijke reactie; ontwikkelingen en samenhangen
*J.G.C. Kester, J. Junger-Tas*

**1995**

139 Grenzen aan hereniging; de regels met betrekking tot het bestaansmiddelenvereiste per september 1993
*R.F.A. van den Bedem, J.C. van den Brink, E.J. Verhagen*

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*M.W. Bol*

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*Ed. Leuw*

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*M. Kruissink, E.G. Wiersma*

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*C. van der Werff, m.m.v. B.J.W. Docter-Schamhardt*

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*E.C. Spaans*

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*A.A.M. Essers, P. van der Laan, P.N. van der Veer*

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*M. Kruissink, L.W. Blees*

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*R.B.P. Hesseling, U. Aron*

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*L. Doornhein, N. Dijkhoff*

**1996**

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*N.M. Mertens*

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*B.S.J. Wartna, M. Brouwers*

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*S. van Leeuwen, A. Klijn, G. Paulides*

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*E.A.I.M. van den Berg, R.J.J. Eshuis*

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*S.M. Hoekstra, Ed. Leuw*

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*E.M.Th. Beenakkers, A.Y. Guérin*

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*Z. Reijne, R.F. Kouwenberg, M.P. Keizer*

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*J.M. Nelen, V. Sabee, m.m.v. R.F. Kouwenberg, R. Aidala*

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*L.W. Blees, M. Brouwers*

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*G.J. Terlouw, U. Aron*

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**1997**

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*E.C. Spaans*

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*Pat Mayhew, Jan J.M. van Dijk*

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*E.C. Spaans, C. Verwers*

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**1998**

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*L. Boendermaker*

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*Ed. Leuw*

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*N.M. Mertens, M. Grapendaal, B.J.W. Docter-Schamhardt*

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*J.M. Nelen, V. Sabee*

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*R.J.J. Eshuis*

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*M.W. Bol, G.J. Terlouw, L.W. Blees, C. Verwers*

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**1999**

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